VOLUME XLI NUMBER 3

Massachusetts Law Quarterly

SEPTEMBER, 1956

(For Complete Table of Contents see page 1)

Record of the 45th Annual Meeting of the Massachusetts Bar Association *at Plymouth, June 16, 1956*

Hon. Stanley E. Qua becomes a Member of the Judicial Council

"Neither Party" Agreements . . . . . A. CLINTON KELLOGG

Fluorine and the Constitution . . . . . JOHN R. AUCHTER

Driving to Endanger —*What does "Negligently" Mean?* F. R. LAGROTTERIA

Planning or Plodding and Zoning . . . . . ROBERT J. TILDEN

Eminent Domain —*Taking a Business for Public Operation* JOHN F. MORIARTY

Professional and Judicial Ethics — *The Practical Importance of the "Codes" and Current Study of Need of their Revision, by a Committee of the American Bar Foundation, with a Request for Suggestions*

Administrative Committee of the District Courts — *Circular Letter*

October 30, 1956

DINNER IN HONOR OF RETIRING CHIEF JUSTICE STANLEY E. QUA

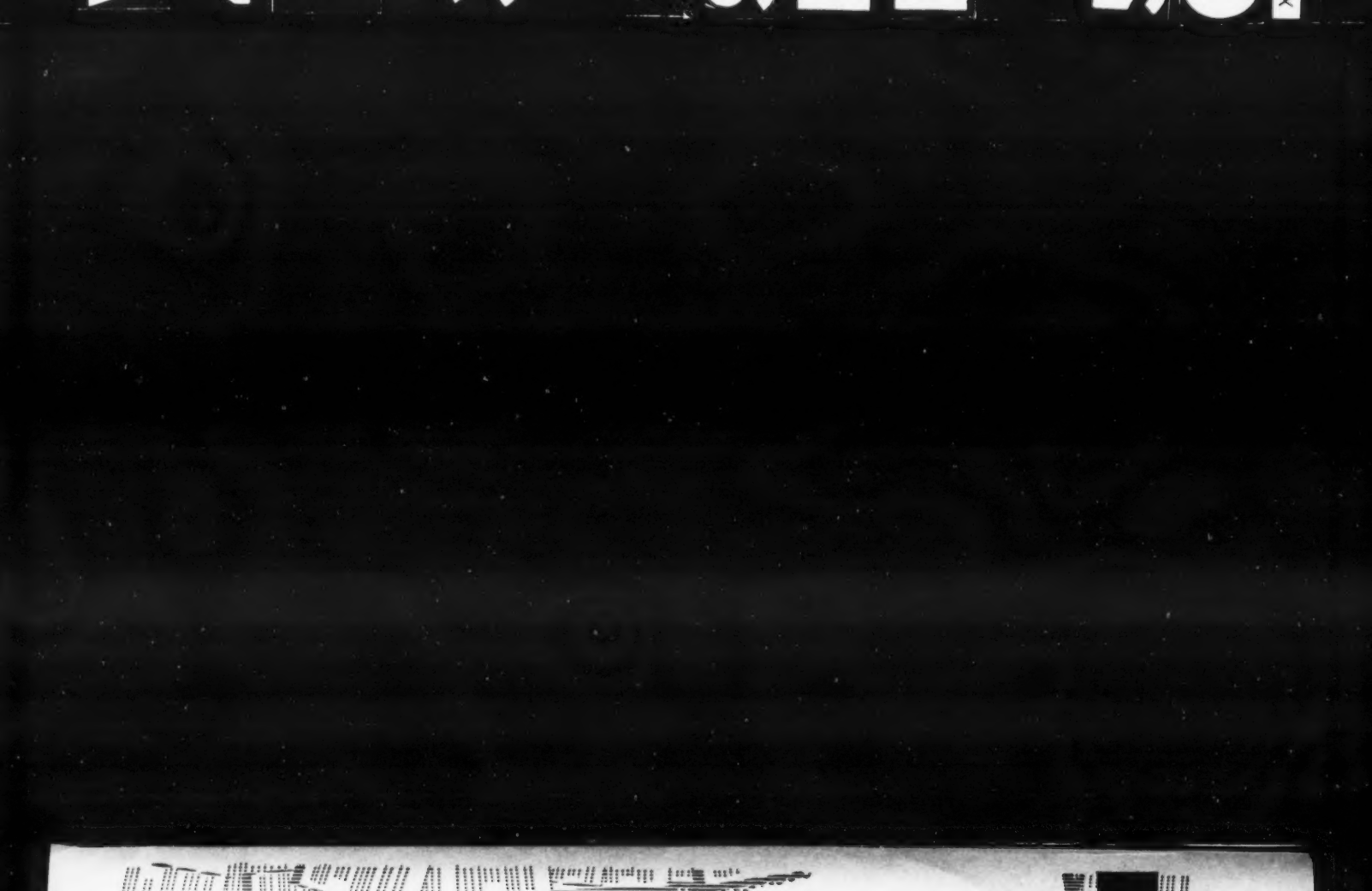
HOTEL STATLER, BOSTON

(See Inside)

Save the Dates

Midwinter Meeting of The Massachusetts Bar Association
Northampton, February 14, 15 and 16, 1957

Issued by the Massachusetts Bar Association
15 Pemberton Square **Boston 8, Massachusetts**



Massachusetts Law Quarterly

Volume XLI **SEPTEMBER, 1956** **Number 3**

TABLE OF CONTENTS

PAGE

Record of the 45th Annual Meeting of the Massachusetts Bar Association *at Plymouth, June 16, 1956* 3

Report of Grievance Committee 6

Report of Treasurer for 1955 57

Report of the 15th Massachusetts Lawyers' Institute *at Plymouth, June 15-16, 1956* . . . GEORGE F. GARRITY, *Chairman* 8

Hon. Stanley E. Qua becomes a Member of the Judicial Council 2

"Neither Party" Agreements . . A. CLINTON KELLOGG 11

Editorial Comment 12

Fluorine and the Constitution . . . JOHN R. AUCHTER 13

Editorial Comment 18

Driving to Endanger —*What does "Negligently" Mean?* F. R. LAGROTTERIA 19

Editorial Comment 20

Report of the Judicial Council in 1927 on Operating Motor Vehicles 21

Planning or Plodding and Zoning . . . ROBERT J. TILDEN 26

Eminent Domain —*Taking a Business for Public Operation* JOHN F. MORIARTY 24

Professional and Judicial Ethics—*The Practical Importance of the "Codes" and Current Study of Need of their Revision, by a Committee of the American Bar Foundation, with a Request for Suggestions* 33

Administrative Committee of the District Courts —*Circular Letter* 45

Guardians ad Litem in Small Estates 51

Medico — *Legal Aspects of Blood Tests* — *A Correction* . . 52

Bar Associations and Court Congestion 53

Book Review —*Massachusetts State Government by The League of Women Voters* . . . . WILLIAM J. CURRAN 54

THE EXECUTIVE COMMITTEE 1956-1957

This committee consists of the president, vice-presidents, secretary, assistant secretary, treasurer ex officiis, five members of the Board of Delegates, and two members from the association at large. At the meeting of the Board of Delegates on September 12 the following were chosen by the Board for the year 1956-1957:

Roger J. Donahue, Westwood
James H. Fitzgerald, Brockton
John J. Foley, Lynn
Harold Horvitz, Newton
Frank L. Kozol, Boston
Laurence H. Lougee, Worcester
William W. Yerrall, Springfield

Pursuant to Article XII of the by-laws the Board elected William B. Sleigh, Jr., of Marblehead as Assistant Secretary.

The general officers of the Association who are ex officio members appear opposite on page 3.

HONORABLE STANLEY E. QUA BECOMES A MEMBER OF THE JUDICIAL COUNCIL

September 27, 1956

Under the authority of General Laws, Tercentenary Edition, Chapter 221, Section 34A, I hereby appoint the Honorable Stanley E. Qua of Lowell, a former justice of this court, to be a member of the Judicial Council.

RAYMOND S. WILKINS,
Chief Justice
Supreme Judicial Court

This appointment is to fill the vacancy resulting from the retirement of Honorable Louis S. Cox after twelve years of service as a member of the Council.

RECORD OF THE FORTY-FIFTH ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION JUNE 16, 1956

The Forty-Fifth Annual Meeting of the Massachusetts Bar Association was duly called and held at 2:00 p.m., Saturday, June 16, 1956 at the Mayflower Hotel, Plymouth, Massachusetts with President Schneider presiding. The President read the call of the meeting.

REPORTS OF OFFICERS AND COMMITTEE

The Treasurer's report was presented to the meeting and a copy is annexed to these minutes. The Treasurer called the attention of the members to the fact that for the year 1955 there was an excess of expenditures over income in the amount of $2,819.95. Upon motion duly made and seconded, it was unanimously (see p. 57)

VOTED: That the Treasurer's Report be accepted and placed on file and that the editor publish the same in the Quarterly.

Mr. Wait reporting for the Nominating Committee submitted the following nominations.

President

Joseph Schneider, Brookline

Vice-Presidents

Raymond F. Barrett, Quincy
Charles S. Bolster, Cambridge
Walter J. Donovan, Adams
Livingston Hall, Concord
Thomas M. A. Higgins, Lowell

Treasurer

Gerald P. Walsh, New Bedford

Secretary

Frank W. Grinnell, Boston

Members at Large—Board of Delegates

Milton J. Donovan, Springfield
James H. Fitzgerald, Brockton
John J. Foley, Lynn
Anna E. Hirsch, Dedham
Richard B. Johnson, Swampscott
Frank L. Kozol, Brookline
Laurence H. Lougee, Worcester

The President announced that no other nominations having been received in writing as required by the by-laws the nominations would be closed. Upon motion duly made and seconded, it was unanimously

VOTED: That the Secretary cast one ballot for the election of the nominees.

The Secretary then cast the ballot and the President declared the nominees duly elected.

Mr. Bodfish reporting for the Committee on the By-Laws summarized the work of his committee and then moved that the by-laws of the association be and hereby are amended by substituting in their entirety the proposed by-laws as set out in the June issue of the Quarterly. The motion was seconded. Mr. Wait then moved in amendment of Article XVI, Section 1 that dues for senior members be $15.00 instead of $7.50. This motion was seconded. Mr. Bodfish then moved in amendment that $10.00 be substituted for $15.00. Mr. Myer Goldman moved in amendment of the same Article that junior membership continue until ten years after admission to the bar instead of three years as at present. Mr. McInerney moved in further amendment to substitute $5.00 for $3.00 as junior membership dues and this motion was seconded. After consideration of a point of order and several further motions to amend, the President asked unanimous consent to place the questions before the house in two parts which was granted. By agreement of the moving parties and those who seconded their motion the question was presented on the increase of senior dues to $12.00. Mr. McInerney moved to amend this figure to $10.00 but his motion was lost, 21 voting in favor and 47 in opposition. The question was then presented on the increase of senior dues to $12.00 and it was

VOTED: That the proposed by-laws be amended by striking out in Article XVI, Section 1 "$7.50" and inserting in place thereof "$12.00."

The question was then presented to the meeting on dues for junior members. On Mr. Donahue's motion as amended pursuant to a suggestion by Mr. Sears it was

VOTED: That Article XVI of the proposed by-laws be amended to provide that junior membership dues be $2.00 for the first three years after admission to the Bar and $5.00 for the ensuing two years.

The question was then put on Mr. Bodfish's main motion to amend the by-laws of the association by substituting the proposed new by-laws as amended with respect to senior and junior dues in the preceding votes but before the question was put Mr. Sears moved in amendment to strike out Sections 2 and 3 of Article XVIII. The motion was seconded but after discussion Mr. Sears withdrew his motion. Mr. Benjamin Goldman moved in amendment of Article VI to substitute "one" term in place of "two" terms. The motion was seconded and also put to a vote but was not carried. Mr. Buckley moved in amendment of Article VII to substitute "third" in place of "fourth". Mr. Bodfish explained the provision in the proposed by-laws and the motion was thereupon withdrawn. Mr. McInerney moved in amendment of Article VII to omit the word "successive". Mr. Bodfish explained the purpose of the proposed by-law as

written and the motion was withdrawn. Mr. Kelley moved in amendment of Article XIII, Section 1 (3) that the following sentence be added: "The Legislative Committee, the Board of Delegates and the Executive Committee shall not urge the adoption or rejection of any legislation upon which the entire membership has not voted or has not been polled and then only when consistent with the majority view or vote." The motion was seconded and was put to a vote but was lost. Mr. Sleigh moved in amendment of Section 2, Article XVIII the insertion of the word "such" after the word "any" in the last sentence of the section. The motion was seconded and was put to a vote and it was

VOTED: That the proposed by-laws be amended by inserting in the last sentence of Section 2 of Article XVIII after the word "any", the word "such".

Mr. Black moved in amendment of article XIV to substitute "25" in place of "50". The motion was seconded and was put to a vote but was not carried.

Mr. Bodfish's main motion for the amendment of the by-laws by substituting the proposed new by-laws as amended with respect to dues and by the insertion of the word "such" in Article XVIII, Section 2 was then put to a vote and it was unanimously

VOTED: That the by-laws of this Association be and the same hereby are amended by substituting for the existing by-laws, the proposed by-laws printed in the June, 1956 issue of the Quarterly as amended by three votes previously adopted at this meeting.

JUNIOR BAR

Roger Donahue stressed the need for greater interest of the senior members of the association of the activities of the junior bar section and moved that it be the sense of this meeting that the President should appoint a member of the junior bar, to be recommended by the junior bar, to be a member of the Board of Delegates and of the Executive Committee and of each Standing Committee with full voting power. The motion was seconded. The President pointed out that a junior bar member could not be elected to the Board of Delegates this year and that it was not within his power to appoint a member of the Executive Committee but announced his intention of appointing a member of the junior bar to each Standing Committee. Mr. Bodfish suggested that the motion be amended to state it as the recommendation of this meeting to the Board of Delegates that a member of the junior bar section who should be recommended by the junior bar be elected by the Board of Delegates to the Executive Committee. This suggestion was adopted by Mr. Donahue and the motion as thus amended was put to a vote and it was unanimously

VOTED: That it is the recommendation of this meeting to the Board of Delegates that one of the persons to be elected to the Executive Committee be a member of the Junior Bar Section recommended by said Section.

GRIEVANCE COMMITTEE

The report of the Grievance Committee submitted in writing by Harold Horvitz, Chairman, was read to the meeting and upon motion duly made and seconded, it was unanimously

VOTED: That the report be accepted with an expression of gratitude for the work of the Committee.

OTHER BUSINESS

Upon motion duly made and seconded, it was unanimously

VOTED: That the thanks of the association be extended to the committee for the planning and carrying on of the Convention and to the officers of the association for their work during the year.

Upon motion duly made and seconded, it was unanimously

VOTED: That the Board of Delegates report at the next annual meeting on any plans which there may be for the acquisition of a building by the Association.

There being no further business to come before the meeting, it was upon motion duly made and seconded, unanimously.

VOTED: To adjourn.

The meeting was thereupon adjourned at 5:40 p.m.

A true record.

ATTEST: WILLIAM B. SLEIGH, JR.
Assistant Secretary.

REPORT OF THE COMMITTEE ON GRIEVANCES

On May 31, 1955 there was one complaint pending which was shortly thereafter closed out with the consent and approval of the complainant.

During the fiscal year just ended, 32 new grievance matters were brought to the Committee's attention through the office of its secretary, of which 12 were disposed of informally by the secretary. The remaining 20 complaints which required more formal attention may fairly be classified as follows:

Dissatisfaction in handling estate	4
Dissatisfaction in handling suit	3
Excessive fee	3
Delay in collecting accounts	3
Alleged error in title	1

Dissatisfaction with counsel	3	
Dissatisfaction with conduct of attorney..	2	
Doctor's complaint re non-payment of fee for medical report	1	20

Of these, 13 were closed by the secretary after correspondence both with the complainants and with the several attorneys concerned, 3 were referred to and disposed of by the Chairman, and 4 are still pending awaiting either reply from or action by the attorneys involved.

Again, as in former years, it can be said with considerable gratification, that none of these complaints were serious in their nature. Many of these would probably never have reached the dignity of a complaint but for the reputation we have established, in the interest of the Bar at large, that any person with a grievance against a lawyer can reasonably expect to have a fair hearing, even (as is most frequently the case) if it develops upon investigation that there is no proper cause for complaint.

Of almost every case that has been disposed of, it may fairly be said that such disposition met with the full approval of the complainant. In the comparatively rare case where the complainant was not satisfied, the answer usually lay in the circumstances that there were strong emotional factors involved which completely obscured the real issues.

Increasingly, people turn to us because, in their eyes, we speak for the lawyers of Massachusetts; and on that account we feel, in our mutual interest, that it is better to lean backwards than to appear to be unnecessarily defensive of the reputation of the Bar. We give service even though, on a strict interpretation of our jurisdictional limits, such service may not be called for. In rare cases, where it appears—because of language difficulties, local prejudice or otherwise—that a suppliant is not able to find an attorney who, according to his lights, can properly represent his interests, we make some attempt, as a matter of public relations, to extend a helping hand in this regard.

Always, year after year after year, the most encouraging aspect of our work lies in the circumstance that we never run into a really bad case nor do we find our investigations hampered by the intransigencies of the attorneys against whom complaints are filed. The Bar at large has come to accept our Committee as part of the service which the Massachusetts Bar Association renders to all lawyers, regardless of whether they happen to belong to our Association.

In such instances, where we have had occasion to refer a matter for an "on the spot" investigation by one of our local committee members, we have always had the most understanding cooperation. None of this work, however, could be half as well done as it has been except for the continuing service and devotion which our

secretary, Arlene Molloy, has given to this job. Conscious of the difficulty in finding her replacement, she has "held over" as secretary without complaint, and for that extra bit of service we must all express our deep gratitude.

Respectfully submitted,

HAROLD HORVITZ, *Chairman.*

FIFTEENTH ANNUAL LAWYERS' INSTITUTE AND CONVENTION AT PLYMOUTH, JUNE 15-16, 1956

The Fifteenth Annual Massachusetts Lawyers' Institute convened at the Mayflower Hotel, Manomet Section of Plymouth, on June 15-16, 1956. The weather throughout the session left nothing to be desired.

President Joseph Schneider presented the greetings on behalf of the Association and presided at the opening session on Friday, June 15. At that time he introduced Honorable Stephen S. Bean, a member of the National Labor Relations Board, who presided over a symposium on Labor and Management Problems. Professor Archibald Cox of the Harvard Law School devoted his attention to "What Is the Law Today?" Mr. Kenneth J. Kelley, Secretary-Treasurer of the Massachusetts Federation of Labor, presented "The Point of View of Unions"; Leon J. Kowal, Esquire, "The Point of View of Management"; and Mr. Saul Wallen, "The Role of the Arbitrator." Although it was a particularly warm afternoon and many of the members would have preferred to be in the water, the session was very well attended.

On Friday evening, the guests enjoyed a clambake on the shore, together with a huge bonfire, as well as individual and community singing. The singing and entertainment was under the direction of Raymond F. Barrett, Esquire, who was ably assisted by Honorable Wilfred Paquet and Honorable Thomas H. Stapleton, with Phil Claff presiding at the accordion. This feature of the program was enthusiastically received, and in the minds of many came to an end all too soon.

On Saturday morning at 10:00 A.M. under the direction of Thomas W. Prince, Esquire, "Mr. District Attorney" was presented. The Committee are most grateful to those district attorneys who participated; namely, Honorable John R. Wheatley of Plymouth County, Honorable Hugh A. Cregg of Essex County, Honorable Sanford Keedy of Franklin County, and Honorable Maurice M. Lyons of Bristol County.

At 11:00 o'clock, Charles D. Post, Esquire, conducted an interesting discussion on recent developments of the State Planning and

Income Tax Law. At the same hour, but in a different room, under the direction of Roger J. Donahue, Esquire, the Junior Bar Conference was held. This was a panel discussion on photography in the Court Room. From the comment which was received, it appeared that the panel discussion on Saturday morning proved to be most popular and satisfactory to the members. The Committee wishes to express its appreciation to Charles D. Post, Esquire, and Roger D. Donhue, Esquire, for their contribution to what appeared to be popular programs.

The business meeting, which was the Forty-Fifth Annual Meeting of the Massachusetts Bar Association, was held on Saturday afternoon, and an extensive discussion as to the dues and the provisions of the By-Laws was held.

The Institute closed with a dinner in the evening, at which time President Joseph Schneider ably presided as toastmaster, and we were again privileged to listen to the remarks of Honorable Stanley E. Qua, Chief Justice of the Supreme Judicial Court. Honorable Luther W. Youngdahl, Judge of the United States District Court for the District of Columbia, was the guest speaker of the evening.

A framed citation expressing appreciation for outstanding service above the requirements of her official duty was presented to Barbara Holmes Neil, Acting Clerk of Barnstable Superior Court.

The program for the ladies commenced with a tea in the Colonial Room of the Hotel on Friday afternoon, where the members were again privileged to meet "Mari", the Palmist to European Royalty, and to listen to the music of Phil Claff and his accordion. On Saturday, June 16, the ladies were offered two choices; a trip by bus to the historical houses and points of interest in Plymouth or a trip to the famous Edaville Narrow Gauge Railroad. In the afternoon at the Shore Club, Alice Dixon Bond, Literary Editor of the Boston Herald and the Boston Traveler, took as her subject, "The Man Behind the Book." This feature was most entertaining and it was considered by many of the ladies as the highlight of their part of the program.

On behalf of the Massachusetts Bar Association; the Co-Chairmen Thomas W. Prince, Esquire and Raymond F. Barrett, Esquire; Mrs. Marjorie L. MacLeod, Secretary; Albert West, Esquire; Mrs. Margery F. Barrett, Chairman of the Ladies Committee, her Co-Chairmen, Mrs. Louise A. Prince and Mrs. Helene S. Garrity; as well as those who served as pourers and hostesses; sincere thanks and appreciation are expressed to all those who assited in all the arrangement or participated in the program.

GEORGE F. GARRITY, *Chairman*
1956 Massachusetts Lawyers' Institute.

"NEITHER PARTY" AGREEMENTS

A. CLINTON KELLOGG
Assistant Clerk of Courts for Norfolk County

It is common practice in our courts for the attorneys who have settled a case to hand to the clerk a paper stating that it is agreed that the entry "Neither Party" may be entered on the docket. Frequently, but not always, the agreement is for entry of "Neither party, no further suit to be brought for the same cause of action". The legal effect of such entries should be of interest to the bar.

As early as 1844 it was held in *Coburn* v. *Whitely*, 8 Met. 272, that the effect of an entry of "neither party" was that the plaintiff was nonsuited and the defendant defaulted, and that neither could have a judgment for costs. In *Marsh* v. *Hammond*, 11 Allen 483, 484, it was held that the entry "N.P." meant nothing more than that neither party appeared further in the action; that it was equivalent to a nonsuit and default by consent, after which no judgment could be rendered by the court. The court further said that in no sense could the entry be regarded as a bar to a future action. In more recent cases the court has reiterated that an agreement for neither party does not indicate that a cause has been adjudicated, that it is a final disposition of the action, is equivalent to a nonsuit and default by consent, and that no judgment can be rendered upon it. *White* v. *Beverly Building Association*, 221 Mass. 15, 17. *Whalen* v. *Worcester Electric Light Co.*, 307 Mass. 169, 172. *Graziano* v. *Albergo*, 328 Mass. 241.

It appears that an entry of neither party disposes of a case with more finality than an entry of judgment. Since it is not a judgment, neither a motion nor a petition to vacate will lie, nor will a writ of review. *Whalen* v. *Worcester Electric Light Co.*, supra. The case is absolutely concluded, and cannot be reviewed by any process.

Nonsuit and default is similar to neither party, as has frequently been held, but there is one significant difference. Since no judgment is rendered upon the case, either or both parties can move to remove, and the court has the power to grant the motion. Presumably, the action remains as an active case until dismissed under rule of court.

No case has been found in Massachusetts specifically concerning the legal effect of the phrase "no further suit to be brought for the same cause of action."

In the case of *Shapiro* v. *Lyon*, 254 Mass. 110, there was shown a record of a previous case between the same plaintiff and one alleged to be a concurrent tortfeasor with the defendant, in which the parties had filed an agreement of "Neither party, no further suit to be brought for the same cause of action". The court said: "An action followed by the filing of such an agreement without more would not

warrant a finding that the agreement was an adjudication of the cause, or anything more than evidence of the purpose of the parties thereto to abandon *that* suit, as distinguished from an intent that the agreement should operate as a full release . . . *Such* an agreement . . . has no greater effect than a covenant not to prosecute further a *pending* action. . . ." (Italics supplied.)

The court does not specifically allude to the words following "Neither party", and perhaps had no reason to, for the suit before it was not between the parties to the agreement. However, by referring to "such an agreement", the opinion at least makes it doubtful whether a further suit by the same plaintiff against the same defendant is barred.

In a Maine case, *Means* v. *Hoar*, 110 Me. 409, it was said, "When, however, the words 'no further action for the same cause' are added, as in the case at bar, the plaintiff's right of further action is barred, not because any judgment of the court follows, but because the plaintiff has entered into an agreement that he will bring no further suit, and he is bound by his agreement." It is unfortunate that the authoritative force of this decision is diminished by two factors: the quoted words are dicta and the Massachusetts case cited as precedent, *Blanchard* v. *Ferdinand*, 132 Mass. 389, holds no such thing.

It is the opinion of the writer that when the question is squarely presented, the court will hold that the agreement not to bring a further suit acts as a bar.

Whether an entry of "Neither Party" may properly be ordered by the court without the consent of the parties it is not entirely clear. *Coburn* v. *Whitely*, supra, held that it was not proper under the facts of the case, but the issue was not squarely raised. *Blanchard* v. *Ferdinand*, 132 Mass. 389, 391, seems to say that the court has the power to order such an entry, but again it is dictum in the case and the discussion is difficult to follow. It appears to the writer that if a "Neither Party" entered by order of the court without the consent of the parties has the same absolute finality as the same entry by agreement, the power to order it should be most sparingly exercised

---

Editorial Comment

We think Mr. Kellogg seems clearly right and has done a professional service in calling attention to the matter. We have always considered "neither party" to be a sensible method of getting a settled case off the court docket without the "red tape" of a judgment. It is all a matter of agreement. When the agreement contains the further provision that "no further suit to be brought for the same cause of action" it is not a release but a specific agreement which seems to constitute an equitable defense of record, its purpose being to *stop* litigation. We suggest that specific performance of such an agreement can or ought to be enforced on motion by

summary order dismissing the second suit. Perhaps this could be provided for by rule.

Mr. Kellogg seems also right in questioning the authority of the court to enter a "neither party" without the consent of both parties. We see no ground whatever for such an order and respectfully submit that it should not be done at all. Are we wrong?

F. W. G.

FLUORINE AND THE CONSTITUTION

by

JOHN R. AUCHTER *of the Springfield Bar.*

INTRODUCTION

The Massachusetts Bill of Rights in Article V, provides: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them. . . ." It further provides in Article X: "Each individual of society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . ."

The purpose of this article is in a general and broad sense to remind all citizens, through their several counsel, that our individual rights are always in danger and that we must always be vigilant, lest we be mindful of their passing when it is too late to bring them back. Each of us must decide for himself just how far he will go along the path of subservience to physical comfort and well being. Each of us must decide for himself just what constitutes a "liberal" and what distinguishes a "conservative." In the time of Samuel Adams, the liberal was he who fought any invasion of his personal liberties. It was in 1771 that Adams said: "If the liberties of America are ever completely ruined . . . it will in all probability be the consequence of a mistaken notion of prudence, which leads men to acquiesce in measures of the most destructive tendency for the sake of present ease."

There has been considerable interest in the attempt by public health officials in various parts of the United States to cause the introduction of fluorine compounds into the public water supplies. Although there exists some disagreement as to the propriety of referring to the plan as fluorination or as fluoridation, let us for convenience use the latter.

The public health officials, supported by members of various professional groups, state that fluoridation will prove to be beneficial

to our teeth. Other individuals, supported by members of professional groups, state that fluoridation will not prove to be beneficial to our teeth. There likewise appears to be some disagreement over the possibility of harmful effects to the human system where fluoridated water is imbibed over a period of years. Of especial interest to members of the bar is the allegation by the proponents of fluoridation that it is legal and constitutional and the allegation by the opponents that it is unlawful and unconstitutional. The purpose of this paper is to acquaint the bar with the legal issues to date.

In an opinion dated January 20, 1953, given to Vlado A. Getting, Commissioner of Public Health, Attorney General Kelly answered two questions affirmatively. The questions were:

(1) Do the laws of the Commonwealth relating to public water supplies permit the addition of fluorides as a dental caries prophylactic to the water supplied?

(2) Does the Department of Public Health have authority to approve the application of fluorides to public water supplies if so requested?

In pointing out that the answer to the first question depended upon the particular enabling statute authorizing any particular city or town to supply water to its inhabitants, the Attorney General quoted the usual form of statute containing the following clause:

"acquire by lease, purchase, gift, devise or otherwise, and hold all lands, rights of way and other easements necessary for collecting, storing, holding, purifying and treating such water and protecting and preserving the purity thereof and for conveying the same to any part of said town" and "said town may construct and maintain on the lands acquired and held under this act proper dams, wells, reservoirs, pumping and filtration plants, buildings, standpipes, tanks, fixtures and other structures, including also purification and treatment works, the construction and maintenance of which shall be subject to the approval of said department of public health, and may make excavations, procure and operate machinery, and provide such other means and appliance and do such other things as may be necessary for the establishment and maintenance of complete and effective water works."

With reference to the second question, the Attorney General quoted the General Laws, chapter 111, section 5:

"The department . . . shall have oversight of inland waters, sources of water supply and vaccine institutions. . . ."

and section 17 of said chapter:

"All petitions to the general court for authority to introduce a system of water supply, drainage or sewerage shall be accompanied by a copy of the recommendation, advice and approval of said department thereon. The department may after a public hearing require a city or town or water company to make such

improvements relative to any existing treatment works as in its judgment may be necessary for the protection of the public health. . . ."

The Attorney General made no reference to other sections of chapter 111 which are concerned with pollution and contamination of waters.

Section 6 of said chapter 111 appears to have some relevance:

"The department shall have the power to define, and shall from time to time define, what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health. . . ."

It is obvious that these sections of the statute are subject to various interpretations, and to date the courts have rendered no opinion or decision relative to these sections or to the subject of fluoridation of the public waters.

The supreme courts of several other states have, however, ruled upon the constitutionality of fluoridation of the public water supplies within their jurisdiction. To date, each of them has rendered a majority opinion in favor of fluoridation. In at least one of these cases, *Chapman* v. *Shreveport*, No. 116282, First District Court, Caddo Parish, Louisiana, the state supreme court overruled the lower court. This is the case now referred to by interested parties as the Shreveport case, and mention of it can start a lively argument. Judge Galloway of the District Court granted an injunction against fluoridation of the city water supply and in a thirteen-page opinion stated that care of the teeth is strictly within the realm of individual and personal dental health and hygiene within which each person should be free to choose his own course of action. The Supreme Court of the sovereign State of Louisiana reversed the decision of the celebrated Judge Galloway. 74 So. (2d) 142 (1954).

Perhaps the best statements of the arguments both pro and con in regard to fluoridation are found in the case of *Kaul* v. *City of Chehalis*, No. 32370, page 575 of the 1954 Advanced Sheets of the Washington Decisions, in which the Supreme Court of Washington, by a five to four decision, affirmed the judgment of the superior court for Lewis County in favor of the defendants in a suit for injunctive relief.

In the Chehalis case, the appellant, Arthur A. Kaul, challenged the validity of an ordinance adopted on June 25, 1951, providing as follows:

"'That a source of fluoridation approved by the State Department of Health be added to the water supply of the City of Chehalis under the rules and regulations of the Washington State Board of Health, such addition to be administered in a manner approved by the State Director of Public Health."

The trial court made certain findings of fact which were not questioned by the appellant. Among these findings were the following which should be of interest:

"VI. That although fluoride is a deadly poison used commercially for the extermination of rats and other vermin, the addition to the municipal water supply of Chehalis of a source of fluoride ion, such as sodium silico fluoride, in the proportion of one part per million will not amount to a contamination and the water will continue to be wholesome. That chlorine is added to water to affect either bacteria or plant life in the water, while *fluoride has no effect upon the water or upon the plant life in the water but remains free in the water and is artificially added for the effect it has on the individual drinking the water.* (Emphasis supplied.)

VII. That dental caries, commonly referred to as tooth decay, is a very common disease of mankind. *That tooth decay is neither infectious or contagious.* That the addition of fluoride to the Chehalis water supply is intended solely for use in prevention of tooth decay primarily in children up to 14 years of age, and particularly between the ages of 6 and 14 and will prevent some tooth decay in some children." (Emphasis supplied.)

The supreme court majority opinion first answered the question as to whether or not the city council of Chehalis exceeded its authority in adopting the ordinance above referred to. In affirming that the city council did not exceed its authority, the court referred to the Laws of 1907, chapter 241, section 29, p. 634 (Rem. Rev. Stat., section 9034):

"The city council of such city shall have power and authority: . . .

(24) Water Supply: To adopt, enter into and carry out means for securing a supply of water for the use of such city or its inhabitants, . . .

(27) Health Board: To establish a board of health; to *prevent the introduction and spread of disease; . . .*

(56) To provide for the general welfare."

The majority opinion made a distinction between the "spread of disease" set forth in the Washington statute and the "spread of contagious diseases" as set forth in the charter of the City of Shreveport.

The opinion cites various federal and state cases and for this reason is the focal point of this discussion. Among the cases cited, we find *Dowell* v. *Tulsa,* ——Okla.——, 273 P. (2d) 859 (1954), quoted as follows:

"We think the weight of well-reasoned modern precedent sustains the right of municipalities to adopt such reasonable and undiscriminating measures to improve their water supplies as are necessary to protect and improve the public health, *even though no epidemic is imminent and no contagious disease or virus is*

directly involved. (Citing authorities.) Where such necessity is established, the Courts, especially in recent years, have adopted a liberal view of the health measures promulgated and sought to be enforced." (Emphasis supplied.)

It also cites *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. Ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765 (1904), which has reference to compulsory adult vaccination and limits the valid exercise of the police power, for the protection of public health, to the prevention of the introduction or spread of contagious or communicable diseases. The majority opinion, in short, subscribes to what it calls a "liberal view" which usually embraces socialized medicine, so called.

In the minority opinion of Mr. Justice Hill, we find the traditional view, if you will, presented in these words:

"The significant circumstances are that the ordinance is designed solely for the purpose of effecting the application of fluorine to the teeth of the residents of Chehalis in order to minimize tooth decay in some children. The use of the city water system as a means of accomplishing this purpose means that the aforesaid 'treatment' becomes compulsory for any person who has to rely upon the city water supply as his source of drinking water. Thus the liberty of which appellant is deprived is the right to decide of his own free will whether he desires to apply fluorine to his teeth for the purpose of preventing tooth decay, based upon his own opinion as to whether it would be advantageous or disadvantageous to his personal health—a matter, incidentally, on which there is marked and bitter divergence of opinion within the medical and dental professions. . . .

"The proposed infringement of the individual's constitutional right of freedom of choice in matters relating to his own bodily care and health certainly is not justified by 'conditions essential to the equal enjoyment of the same right by others,' suggested as the basis for the restriction of individual freedom in *Jacobson* v. *Massachusetts*, supra. Nor is it justified by 'pressure of great dangers' to the public health.

"While dental caries may be termed a 'disease' which is prevalent in the teeth of almost everyone, it is not contagious or communicable in any way. Dental caries in no way endangers the public health in the sense that its existence in the teeth of one individual might adversely affect the personal health of any other individual. To thus extend the concept of 'public health' would open the door to compulsory mass medication or preventive treatment for any disease, solely on the ground that it is for the individual's own good, without regard to his inherent right to determine such matters for himself."

In the minority opinion of Mr. Justice Donworth, the point is made that the city of Chehalis has authority "only to furnish its inhabitants with an ample supply of *water*. Fluoride is not

water. . . ." This would appear to distinguish between two rights, namely, the right to supply water and the right to prevent the spread of disease. The view would appear to be that the city can introduce into the water only chemicals intended to prevent the spreading of disease through the water or contained in the water.

Here, the battle lines have been drawn. It is for us as members of the Massachusetts bar to ask, is there a violation of our civil rights falling within the constitutional protection of due process? Is fluoridation *ultra vires* because the police power is exercised through a municipal agency operated by the city in its proprietary capacity? Is there a violation of rights guaranteed each citizen by the first amendment of the United States constitution? What about the fourteenth amendment? Is there a danger here in subscribing to a view or philosophy which embraces the treatment of individual citizens regardless of its necessity with reference to the health of those around them? How should we distinguish between public necessity and public convenience?

Several states have, through their supreme courts, already answered these questions. It appears likely that the Supreme Judicial Court of the Commonwealth will shortly be asked to render its opinion. Are fluorine and the constitution incompatible?

Editorial Comment

Mr. Auchter has raised a challenging question for the bench and bar to think about, and we join him in the challenge.

Carrots are said to be good for the eyes. Some people have weak eyes. Why not pass a statute or ordinance to compel us all to eat carrots every day?

What is the difference? The human itch for power crops up in unexpected ways in groups as in individuals. While we don't have to eat carrots, we all do have to drink water or some liquid in order to live, and most of us have to drink from the public water supply. So somebody wants to force most of us to drink fluorine because he thinks it is good for the teeth of some of us. The compulsion is there just as it would be in the case of carrots.

The introduction of the word "liberal" by the majority opinion of the Washington Court is significant but not impressive.

The words "liberal" and "conservative" as commonly used today have nothing to do with the subject. American people seem to have lost the sense of discrimination in the use of the English language. Those words seem to be used either as epithets (political or otherwise) or as some sort of indiscriminate and dogmatic self description which is supposed to avoid the necessity of thinking things through. We are reminded of Maitland's remark that the somewhat ambiguous word "quasi" was the only Latin word which the English bar really loved.

F. W. G.

DRIVING TO ENDANGER

What is the meaning of "Negligently" in a Criminal Statute?

by

F. R. LAGROTTERIA *of the Pittsfield Bar*

Recently I was confronted with a client who was being charged with the crime of operating to endanger, or, more specifically: "Whoever upon any way or in any place to which the public has a right of access operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered. . . ." This quotation will be recognized as an abstraction from the General Laws (Ter. Ed.), Ch. 90, Sec. 24(a). This was my first view of this section, having recently been admitted to the bar.

I found myself quite lost as to the meaning of the word "negligently" as used in the statute. Certainly, the legislature could not have intended that mere civil negligence could form the basis for marking a person as a criminal for what might be a mere error of judgment. Also, if the statute was so construed then a man might be found guilty of this crime, notwithstanding negligence of another vehicle involved, and yet, in a civil action for the same incident, no recovery could be had against him because of contributory negligence.

I descended upon older members of the bar for aid as to the meaning of the section; whether civil or criminal negligence was involved. Most of them responded with the understandable notion that mere civil negligence was the test. These opinions were somewhat shocking since the statute may impose criminal penalties that could mean imprisonment for as long as two years!

After submitting a rather winded discussion of the inequity of the portion of the statute quoted to the Editor of this magazine I was graciously referred to the 3rd Report of the Judicial Council in 1927 printed in the *Massachusetts Law Quarterly* for November, 1927. Apparently, the term "negligently" was inserted in the statute in 1928, 4 years after the original statute had been constitutionally challenged in Com. v. Pentz, 247 Mass. 500. An amendment, which was later to incorporate the word "negligently", was considered by the Judicial Council at that time in part as follows: "The bill is intended to avoid the liability of perfectly innocent and well-intentioned careful persons to criminal proceedings which is now possible under the literal meaning of the statute that has been upheld by the Supreme Court." (Reference was made to Commonwealth v. Pentz, supra.)

The amendment as originally proposed included the terms "wilfully or negligently," but the Judicial Council felt that the only term

necessary was "negligently" and stated: "We think the courts and the jury may be safely trusted to find him guilty within the common-sense meaning of the word "negligently" thus inserted. The common-sense meaning of the word "negligently" completely evades this neophyte attorney. The legal connotation in civil actions is spoken of in terms of ordinary negligence. By a certain play on words involving gratuitous bailments, guest-host relationships, and others, we find the courts speaking of slight, ordinary, and gross negligence. Further discussions speak of criminal negligence which seems to import wilful or wanton or reckless conduct. When the Judicial Council stated in substance that the bill was intended to protect the innocent, and recommended that "negligently" was an adequate term to particularize a crime, they seem to have been contradicting the exact meaning of what they said the bill intended. Prior to the amendment a court might look beyond mere civil negligence to find a man guilty of operating to endanger lives. But when the amendment was inserted they had a standard to guide them which rested on a foundation that was utilized in civil actions, and allowed them to find guilt where they might have otherwise, prior to the amendment, decided that the particular conduct was not criminal.

It was suggested to me that the Judicial Council had recommended the statute to read " . . . so negligently . . . ," but that the draftsman at the State House changed it to "negligently so," and that this error may be the reason why courts construe the term "negligently" in its civil meaning. However, I do not feel that a rewording of the section in this respect as originally recommended by the Judicial Council will help since the word "so" is not such a term, even if placed in a different position, as would clearly indicate that the statute meant more than civil negligence. In order to serve the purpose which was the intention of such a section, are not more clearly understandable qualifying words necessary to remove all doubt that civil negligence is not the ultimate test?

EDITORIAL COMMENT

We are glad that Mr. Lagrotteria has raised this question since it seems to be a practical one for other lawyers and judges. The emphasis on the word "civil" negligences seems to us to obscure the problem of the meaning of a *Criminal* Statute which does not use the word "negligence" but says "negligently so that," this is not quibbling.

The word "negligently" cannot be understood without realizing that the dominant qualifying words "*so* that" the public is "endangered" constitute the substance of the offense to be established under the criminal standard of proof "beyond a reasonable doubt." The original wording of the Statute shown in the Council report is to be considered. That wording might, perhaps, have been held too vague for enforcement, but it was upheld and the meaning of the

words "negligently so that" are indicated by the reasons for their insertion as stated in the Council report. If any one can suggest better words to carry out the obvious purpose of the Statute we shall be glad to hear about them.

It must be remembered that every car is a dangerous machine and its mere presence on the highway is dangerous; but we all have to live with the dangers of modern travel. With this in mind we simply submit that the practical conception of "endangered" as a result of behavior is the substance of the offense as the guide to the meaning of the other words including the nature and degree of the word "negligently." All this, of course, requires common sense of the judge in deciding or in explaining the law to a jury and common sense of the jury in considering the facts of behavior and danger. This, of course, requires care, but as in other branches of law, it can be done and it would seem to be the only reasonable intention to be attributed to the legislation. (See cases referred to under the section in the Annotated Laws including manslaughter cases.) Are we wrong?

To assist our readers to think it through for themselves we reprint in full the report of the Judicial Council in 1927.

F. W. G.

REPORT OF THE JUDICIAL COUNCIL IN 1927 RELATIVE TO OPERATING MOTOR VEHICLES

(From the 3rd Report of the Judicial Council pp. 35-37.)

By legislative order, the Council was requested to investigate House Bill 585 and to include its recommendations with drafts of legislation in its report.

House 585, introduced by George F. James (which passed both houses and, after being submitted to the governor, was recalled by the Senate), proposes to amend G. L., c. 90, §24, as heretofore amended by inserting after the word "so" the words "wilfully or negligently," so as to read as follows:

> SECTION 24. Whoever upon any way operates a motor vehicle recklessly, or while under the influence of intoxicating liquor, or so *wilfully or negligently* that the lives or safety of the public might be endangered . . . shall be punished by a fine of not less than twenty nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years or both. . . .

The bill is intended to avoid the liability of perfectly innocent and well-intentioned careful persons to criminal proceedings which is now possible under the literal meaning of the statute that has been upheld by the Supreme Court. The issue appears by reference to the

opinion of the Supreme Judicial Court in Com. *v.* Pentz, 247 Mass. 500, especially at pages 509-510, where Chief Justice Rugg says:

> The statute according to its plain words makes the act of operating a motor vehicle on a way "so that the lives or safety of the public might be endangered" a criminal offence. It is that act which is penalized. The intent with which the act is done is an immaterial factor. It is irrelevant whether the act is negligent, or not. Although it may be difficult to conceive of the operation of a motor vehicle on a way so as to endanger the lives or safety of the public which does not at the same time involve some element of negligence, nevertheless, the statute says nothing about negligence. Therefore, the question of negligence is foreign to the issues raised under the indictment. The only fact to be determined is whether the defendant did the prohibited act. This belongs to the class of statutes, of which there are many instances, where the General Court, legislating for the common welfare, has put the burden upon the individual of ascertaining at his peril whether his conduct is within the sweep of a criminal prohibition. The performance of the specific act constitutes the crime. The moral turpitude or purity of the motive by which it was prompted, and the knowledge or ignorance of its criminal character are immaterial on the question of guilt. Commonwealth *v.* Mixer, 207 Mass. 141, where many such statutes are reviewed. Commonwealth *v.* Sacks, 214 Mass. 72. Commonwealth *v.* Lanides, 239 Mass. 103. Attorney General *v.* Tufts, 239 Mass. 458, 500. United States *v.* Balint, 258 U. S. 250, 252. Griffiths *v.* Studebakers, Ltd. (1924) 1 K.B. 102. It follows that the first five requests of the defendant for instructions, to the effect that there must have been on the part of the defendant an intent to endanger the lives and safety of the public, or wanton, reckless or foolhardy conduct, or deliberate disregard of the safety of others, or gross negligence, were denied rightly.

Following this case in the still more recent case of Com. *v.* Mara, Adv. Sh., p. 1781, decided October 14, 1926, the court said:

> "Under the charge the jury could convict if they found that the defendant, by the manner in which he operated his car, created a reasonable possibility of danger to the lives and safety of the public, and if he was by reason of the manner in which he operated the car in whole or in part the cause of that danger."

Again, in Com. *v.* Vartanian, 251 Mass. at p. 358, the court said:

> "The operation of a motor vehicle in violation of the statute alone constitutes the offence. Criminal liability does not depend upon negligence or the intent with which the act is done. (Cf. Com. *v.* Dzeweican, 252 Mass. at 130. Com. *v.* Coleman, 252 Mass. at 243.)"

Under the statutes, therefore, a man may be criminally liable to imprisonment under circumstances which, if any damage resulted to other persons, would not subject him to a liability for damages in a civil proceeding. The judges of the district courts find great difficulty in administering the statute and some of the judges of the Superior Court, we understand also find it difficult to explain to a jury what it means.

Some officers who prosecute such cases before juries feel that the statute is a valuable one. Others think it would be better if the statute were made clearer in some way as is suggested by House Bill 585. In the opinion in the Pentz case above quoted, Chief Justice Rugg says: "Although it may be difficult to conceive of the operation of a motor vehicle on a way so as to endanger the lives or safety of the public which does not at the same time involve some element of negligence, nevertheless the statute says nothing about negligence."

We do not think the legislature could have intended to subject a man to criminal liability for imprisonment if by accident a situation arises without fault on his part which happens to be dangerous to the public on the highway, and yet this absolute criminal liability, or something so near it that it is difficult for judges to discriminate in the application of it, seems to be the meaning of the statute. Of course, a law of such uncertain meaning in its application is bound to result in appeals. When a case gets before the jury we understand that it is difficult to get a conviction unless the jury feel that the defendant ought to have used better judgment than he did under the circumstances. But unless this judgment of the jury amounts to the finding of negligence as a matter of common sense, then the crime seems to be one which is not defined by the statute but is simply an instruction to the jury to do about as they please in the matter. The tendency to create criminal liability in cases in which there is no criminal element or intent, express or implied, seems to us mistaken. The only justification for it, if there is any, is in some cases where experience shows that the mere happening of the fact is almost invariably evidence of its criminal character.

The proposed amendment in House Bill 585 would add the words "wilfully or negligently." We see no need of anything except the insertion of the word "negligently." If any one "wilfully" operates a car "so that the lives or safety of the public might be endangered" we think the courts and the jury may be safely trusted to find him guilty within the common-sense meaning of the word "negligently" thus inserted. Accordingly we recommend the statute be amended so as to read:

"Whoever upon any way operates a motor vehicle . . . so negligently that the lives or safety of the public might be endangered. . . ."

WHAT IS "REASONABLE COMPENSATION" FOR "APPROPRIATION", UNDER THE 10TH ARTICLE OF THE BILL OF RIGHTS, BY A CITY, OF LAND AND THE BUSINESS THEREON FOR THE PURPOSE OF CONDUCTING THE SAME BUSINESS THEREON?

by

JOHN F. MORIARTY *of the Holyoke Bar*

In the very recent case (decided on July 27) of *Tate* v. *Malden* (1956 Ad. Sheets, p. 1025, 136 N.E. 2nd, 188) the Supreme Judicial Court held that a city could lawfully take land by eminent domain for public parking purposes, even though such land was already being used by its owners for public parking purposes at the time of the taking.

The decision appeared to turn on the points; (1) that use for a public parking lot by a private owner was not such a "public use" as would prohibit the taking, since the owner could at any time sell the land or change the use; and (2) that a taking by a city for a public parking lot is a taking for a public purpose.

There can certainly be no reasonable quarrel with the court's reasoning on these two points.

There is, however, a third point involved in this case which was not discussed by the court in its decision and which may or may not have been argued by counsel. The third point involves the compensation which was or which can be paid to the plaintiff for the loss of his business.

It appears that the plaintiff was conducting an off-street parking business on the land in question at the time of the taking. His business was a property right which should not be taken from him without compensation.

However, it would seem that when the city took Mr. Tate's property for the avowed purpose of conducting the same business which was previously being conducted by Mr. Tate, it very effectively took Mr. Tate's business and good will as well as his land and buildings.

It would have been a very different situation if Mr Tate had been conducting some other type of business, as for example a retail store. In the latter instance he could move his business to another location, he would be compensated for the fair value of his land and buildings, and his good will would presumably follow him to his new location.

In this case, however, the city proposes to conduct the same type of operation that Mr. Tate had previously conducted, and on the same site. Mr. Tate may open a new off-street parking business on a new site. If he does so however, he will face the competition of

the city doing business on the site previously developed for such a business by Mr. Tate himself. Under the circumstances, it would be most unrealistic to assume that the city will not have appropriated a substantial part, if not all of the good will previously established by Mr. Tate.

There would, perhaps, be nothing wrong with the taking of Mr. Tate's business and good will, if provision were made to compensate Mr. Tate for these losses. However, his only remedy under our law is under the provisions of Chapter 79 of the General Laws. That statute has long since and consistently been interpreted as providing that the measure of damages in eminent domain cases shall be the fair market value of the real estate just prior to the taking. Our courts have held that there can be no recovery under this statute for losses in business caused by the taking. (New York etc. R. Co. vs. Blacker 178 Mass. 386; Baily vs. Boston etc. R. Co. 182 Mass. 537; Boston Belting Co. vs. Boston 183 Mass. 254; and Nashua River Paper Co. vs. Commonwealth 184 Mass. 279.)

It would appear therefore, that Mr. Tate has no available method by which he may obtain compensation for his loss of business and good will, and that he has therefore been deprived of his property without compensation in violation of the due process clause of the Constitution of the United States.

This type of situation is not without precedent. The same or very similar circumstances existed in the leading case of Monongahela Navigation Co. vs. U. S. 148, U. S. 312. In that case Congress had taken a dam and certain locks owned by the Monongahela Company. The court held that by so doing the United States had also taken the company's business of collecting tolls. The court further held that the company must be compensated for such a taking of its business.

In arriving at its decision in the Monongahela Case, the court quoted with approval the language of a Pennsylvania court in the case of Montgomery County vs. Bridge Company 110 Penn St. 54, 58 (a case where the government had taken a privately owned bridge) as follows:

"The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectively taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. . . ."

It would seem that the reasoning of the Monongahela and Montgomery County Cases should apply to the Tate case, where Mr. Tate's public parking business has been effectively taken. As has been observed above, there seems to be no procedure under our law whereby Mr. Tate can obtain compensation for his business.

The situation in which Mr. Tate found himself is apt to be re-

peated in other cases. Today many cities and towns are providing municipally owned off-street parking facilities in their business districts. It seems reasonable to expect that in many cases the property most desirable for such facilities will be property which has already been developed for such uses by private individuals. Unless these individuals are to be stripped of their businesses without compensation, some change in our law is required, either by legislative amendment or by a judicial clarification of the provisions of G. L. (Ter. Ed.) C. 79.

EDITORIAL COMMENT

Article X of the Bill of Rights reads:

"And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

We wonder whether it is foolish to suggest that while loss of business may not be claimed (because "indirect") under the statute about a land-taking, with so specific a provision in the Bill of Rights an action of contract might be brought against a city or town directly under that constitutional provision in a case like the Malden case parallel to the proceeding for the land-taking under the statute.

F. W. G.

PLANNING OR PLODDING

by

ROBERT J. TILDEN
of the Barnstable Bar

The series of articles about Zoning and Planning Boards appearing in recent issues of the *Quarterly* has focused attention upon defects and dangers in our present system as viewed by the conveyancer and the landowner.[1] Little has been said from the standpoint of the planning board members, "those ordinary men with no special training or aptitude for the position."[2] the "arbitrary" oligarchy "unfitted for the job by education, training, experience and even temperament"[3] who conscientiously try to discharge their civic duties with no compensation and with little appreciation.

In many ways, the position of the planning board is often the

[1] "Procedure in Appeals in Massachusetts from Decisions of Boards of Appeal under Zoning Ordinances and By-Laws" James M. Rosenthal XL *Mass. Law Quarterly* 45-54, Oct. 1955.
"Zoning and Planning Boards—Another Problem" Anonymous XL *Mass. Law Quarterly* 54-56, Oct. 1955.
"Zoning and Planning" Arnold S. Dane et all., XL *Mass. Law Quarterly* 18-35, December, 1955.
"Zoning and Planning" Anonymous Encore XLI *Mass. Law Quarterly* 26-28 June, 1956.
[2] XL *Mass. Law Quarterly* 29.
[3] XLI *Mass Law Quarterly* 27.

position of the public, or of the community, and as such, is of principal importance. Certainly the rights of the individual and the marketability of titles should be assiduously protected, but so should the interests of the community and the rights of the minorities within the community who lack the economic power to combat the mass developer (or "exploiter"?) who seeks to alter completely the atmosphere of a community in the name of "progress."

In the seventeenth and eighteenth centuries, the inhabitants of Massachusetts towns could determine who might be admitted and who excluded from settlements within the town limits. The practice of "warning out" and the rules regulating becoming "towned" are eloquent monuments to our early democracy. With such a history, is it unreasonable for a town to say, "If you will settle here you must accept the 'plan' we have established for our destiny"? Admittedly, if more towns complied with the statutory *requirement* of a Master Plan[4] it would be easier for developers to know where they would find a welcome; but, since there are local plans and planning boards, should not the developer inform himself before he buys? Is he not presumed to know the law?[4a]

A number of excellent recommendations have been made toward the compulsory publication of town ordinances and by-laws, and it seems difficult to believe that a "Register for all town by-laws, ordinances, rules, regulations, acceptance of statutes, etc." as Mr. Dane suggests[5] could not be established if the Bar were united in the belief that such a publication is in the public interest. Many towns, like Harwich, do have their own local publications, and some, like Falmouth, keep them up to date with annual supplements. Metropolitan lawyers involved in matters in small towns might benefit from association with local counsel. The Division of Planning in the State's Department of Commerce has a growing collection of local publications and by-laws. A little co-operative effort by informed conveyancers could quickly make the collection complete, and an index could easily be compiled and circulated.

The availability of local ordinances is a problem, but it is a solvable one. The critical issue is the proper role of the planning board, and the crux of that problem lies in the present operation of the Sub-division Control Law[6]. This well intentioned piece of legislation saddles all planning boards with the responsibility for so much administrative detail that they have little, if any, time left for their primary mission—municipal planning.

There seems to be a growing impression that the planning board function consists of regulating the design and construction of ways in subdivisions and granting variances from limitations imposed by the zoning by-law. The fact, however, is that the first is only

[4]G. L. Ch. 41, Sec. 81D.

[4a]In this connection it may be noted that the Court in two recent zoning cases (*Blackman v. Board of Appeals of Barnstable*, 136 NE2d 198 and *Atherton v. Board of Appeals of Bourne*, 136 NE2d 201) emphasized that the proprietors acquired the land in question after the zoning by-law became effective, footnote 1 page 199, and page 202.

[5]XL *Mass. Law Quarterly* 19.

[6]G. L. Ch. 41, Sec. 81K—81GG.

that part of its duty which results from the Subdivision Control Statute, while the second is a board of appeals' responsibility outside the control or influence of the planning board.[7]

Municipal Planning as provided for by statute[8] and the planning board's duty as understood by the average member consists of *planning* and not *administration* of regulations governing subdivisions. Indeed the language of the statutes is not only explicit, it is mandatory. "The planning board . . . *shall* . . . make careful studies and . . . prepare plans of the resources, possibilities and needs of the city or town, and . . . *shall* submit . . . a report thereon, with its recommendations. It *shall* report *annually* . . . giving information regarding the condition of the city or town and any plans or proposals for its development . . . ."[9] "A planning board *shall* make a master or study plan of such city or town . . . ."[10] "No zoning ordinance or by-law . . . (shall be amended) . . . until after the planning board . . . has held a public hearing . . . and has submitted a final report *with recommendations* to the city council or town meeting . . . ."[11] " . . . no public way shall be laid out, altered (etc.), unless the proposed laying out (etc.) has been referred to the planning board . . . and such board has reported thereon. . . . Any town . . . may . . . provide for the reference of any other matters . . . to the planning board before final action with or without provision that final action shall not be taken until the planning board has submitted its *report* . . .[12]

The foregoing list is not a complete catalogue of all planning board legislation, but it serves to illustrate the proposition that the legislature intended that planning boards should be concerned primarily with planning; and that planning is translated into action by the planning board's *advising* the municipal legislative body rather than by its being an administrative body.

Consequently, the present provisions of the Subdivision Control Law which require planning boards to act on every subdivision plan of land within their jurisdictions impose major administration obligations and by so doing prevent most boards from having time to do any basic planning. Such a situation ought not to be permitted.

It is not possible to know accurately what percentage of planning board time is taken up with subdivision control problems. Obviously, the demands are heaviest in the towns enjoying (?) the most rapid growth which are the very communities where planning is most urgently needed. The recent experience of the Town of Falmouth may be typical. There a volunteer board is scheduled to meet once a month for routine matters and to have such additional special meetings as adequate consideration of articles in the annual and special town meeting warrants may require. In 1955, the board

[7] G. L. Ch. 40A, Sec. 15(2).
[8] G. L. Ch. 41, Sec. 81A *et. seq.*
[9] G. L. Ch. 41, Sec. 81C, *cf.* also G. L. Ch. 41, Sec. 70 which is incorporated in Sec. 81B by reference.
[10] G. L. Ch. 41, Sec. 81D.
[11] G. L. Ch. 40A, Sec. 6.
[12] G. L. Ch. 41, Sec. 81I.

considered one hundred forty plans, of which number one hundred four were found not to require planning board approval. Thirty-six required hearings. Some of the hearings extended into several sessions. Thirteen special meetings were necessary consequently, during the year, yet in spite of the numerous meetings, little or no time was left to the board for planning. If the present volume of plans continues, the 1956 totals promise to be substantially greater.[13]

Informal discussions with members of other planning boards indicate that the Falmouth experience is typical. Some boards are said to have attempted to break the log jam by having the Town Clerk (or some employee in the Town Clerk's office) sign for the planning board those plans presented which do not require planning board approval under Section 81P of the Subdivision Control Law.

This may be a desirable procedure, provided the person exercising the authority is sufficiently qualified to do so; but it is not authorized by the statute as presently drawn. It must be recognized that where the practice exists there has been a confusion of the board's duty to make the determination whether or not a hearing is required (which function may not be delegated) and the ministerial act of endorsing on the plans the substance of the board's decision (which function may be delegated). If the load now carried by planning boards is to be lightened by this device, statutory revision is necessary. How this might be done will be suggested below.

In addition to the problem of relieving planning boards of a time consuming burden, there is a second reason why planning boards should be relieved of responsibility for subdivision control; namely, the application on the municipal level of the constitutional principle of the separation of powers. As every high school student knows, the political thinkers of our revolutionary period who framed our state and national constitutions attached major importance to this principle[14] and firmly established it with constitutional guarantees.[15]

It is not only Montesquieu's historic dicta that "when the legislative and executive powers are united in the same person or body there can be no liberty" which prompts the objection. There is the practical consideration that different functions require different talents and temperaments. Persons who are qualified to be broad range, general policy planners are not likely to be suited for the detailed application of rules and regulations to the daily run of administration. Individuals who have the technical skills and disposition to handle routine administrative matters may not have the detachment necessary for making broad policy recommendations.

It seems strange that a culture which has placed such emphasis on a political principle at the national and state level should have been so indifferent to it on the community level. With the present growth of our municipal governments it may now be time to

[13]1955 Falmouth Town Report 123.

[14]James Madison, *The Federalist No. XLVII*, from the "New York Packet," February 1, 1788.

[15]Constitution of the United States, Article I, Section 6; Article II Sec. 1; Constitution of the Commonwealth of Massachusetts, Article XXX.

reëmphasize this and other fundamental principles. It can no longer be contended that there are not enough people qualified for public office, and one may well ask if it is fair to the office holder to place him at once in an administrative and legislative role.

As has been pointed out above, the *primary mission* of a planning board is to do planning; not for planning's sake alone, but that it may *advise* other officials. Ordinarily such *advice*, even when furnished to administrative officers, is made with regard to pending or recommended proposals to be submitted to the legislative body for consideration and action. Many kinds of proposals *must* be referred to the planning board for its recommendation before any action can be taken by the town meeting or city council.[16] Consequently, the major role of a planning board is an advisory one and its advice is primarily a service to the legislative department. It is, in effect, an agency or a committee of the municipal legislature.

That being the case, it seems highly improper for a planning board to be given administrative duties. The statute enabling towns to authorize the planning board to act as park commissioners[17] is an example of such an anomalous situation. Recent experience with the Subdivision Control Law[18] provides numerous instances of the congestion and problems which result, to say nothing of the "tyrannical acts" sometimes said to occur.[19]

Let there be no mistake. No criticism is intended of the objectives of the Subdivision Control Law. On the contrary, it is submitted that those objectives can best be realized by taking administrative responsibility away from the planning board and placing it in the hands of a paid municipal administrative officer such as the Town (City) Engineer, the Building Inspector, or some other administrative official specifically appointed for that purpose.

This could be accomplished very easily by following the pattern already used for zoning.[20] Instead of the planning board's regulations being adopted under Section 81A, there could be a subdivision by-law adopted by the town meeting (and amended by the town meeting when necessary) with the advice and recommendations of the planning board in the same manner that zoning by-laws are now adopted and amended. This by-law could specify in detail what is to be required in the construction of streets and ways, the minimum and maximum widths and grades, the radius of curves, the type of surface and subsurface; the requirements for drainage, curbs, grass plots, and anything else deemed necessary. Closer co-ordination with the zoning by-law could be effected, compliance with the master plan assured, and bonds to protect the town from loss through incomplete construction could be required.

Developer, landowner and conveyancer alike would benefit by the

[16] *Eg.* Zoning By-Laws, G. L. Ch. 40A, Sec. 6; Sec. 20; Laying out public ways, Ch. 41, Sec. 81I.
[17] G. L. Ch. 41, Sec. 81C.
[18] G. L. Ch. 41, Sec. 81K—81GG.
[19] John A. McCarty "Planning Boards and Subdivision Control Again" XL *Mass. Law Quarterly* 28, Dec. 1955.
[20] G. L. Ch. 40A

foreknowledge of requirements. A competent engineer could reasonably determine whether a proposed plan complied with the requirements of the by-law and whether it conformed to the physical limitations of the ground. Even more important, there would be a competent administrator—available in usual business hours[21]—to provide information and to make periodic inspections. Adequate inspection could insure that the construction was made in conformity with the approved plan. Provision could be made for a certificate that a given subdivision layout or building complied with the requirements of the local zoning, subdivision, or building codes. Such a certificate might be made binding on the town in the way that a tax collector's lien[22] certificate is.

Parties aggrieved by decisions of the engineer could have an appeal to the board of appeals as in zoning matters. The growing number of recent decisions of the Supreme Judicial Court has focused attention upon the importance and the power of local boards of appeal. They are rapidly becoming a judicial tribunal of prime importance. As such, they should be supported with the same safeguards that are afforded all courts.

In some towns, there are several such boards: one for zoning matters, [23] another for cases under the building code,[24] as well as one for appeals arising under the Subdivision Control Law itself.[25] This makes for confusion and for conflicts.

There should be only a single Board of Appeals to hear all cases arising out of municipal ordinances and by-laws. Because the board would hear appeals from decisions of the Selectmen, the terms and method of selecting members should be on a relatively long term basis. Every reasonable effort should be made to keep the board as free from political pressures as possible. Appointees should hold no other municipal position or be otherwise susceptible to any form of personal interest conflicting with their official duty. Needless to say, the appointees should be well qualified by temperament, experience, and judgment for the post. Their decisions should be public records, readily available to all. Decisions granting variances in the use of real estate should be recordable in the Registry of Deeds.

It is a position calling for the wisdom of a Solomon in a society where there are too few Solomons. Yet much of the criticism currently directed at planning boards, zoning, and even building codes, is as often caused by the capricious decisions of appeal boards as by the by-laws they have been empowered to enforce.

It has been suggested before that zoning by-laws and their amendments should be published. This is certainly true, even though most annual town reports contain the votes taken on articles in the warrants of their annual and special meetings. What is particularly lacking is a statutory requirement that by-law amendments

[21] XL *Mass. Law Quarterly* 54, Oct. 1955.
[22] G. L. Ch. 60, Sec. 23.
[23] G. L. Ch. 40A, Sec. 14 and 15.
[24] G. L. Ch. 143, Sec. 2.
[25] G. L. Ch. 41, Sec. 81Z.

which must be submitted to the Attorney General shall be submitted within a specified number of days of their adoption by the town meeting. Road takings are required to be seasonably recorded, why should not by-law changes—and any objections thereto—be similarly submitted within a reasonable time. Under the present state of the law, the responsible administrative officer can, and often does, frustrate the will of a two-thirds majority of the legislative branch by failing or neglecting to report its action to the Attorney General. Such delays can defeat the very purposes for which the amendments were adopted.

Advocates of home rule do not take kindly to the proposal that zoning and subdivision codes should be state enacted rather than local legislation. There is a middle course which could do much to satisfy the principal contentions of both camps. Uniform codes locally adopted provide the answer. Every town would not have to have all the zones another town has, but it could have the same definitions and the same terminology for such common provisions it might vote to have. If that were the case, interpretations by the courts would be of value wherever the same language is used and not limited by its uniqueness to a given Town's ordinance. The conveyancer or advocate versed in the code of his home town would be less a stranger when checking the provisions of other communities. Variations in the details such as minimum lot sizes, building set backs, or width of ways would be no problem so long as the general patterns and legal principles remained constant. Such a project might well be begun on a regional basis. It could be a good undertaking for the proposed regional planning boards, or for a committee of the county bar associations.

In all these cases, the role of the planning board would remain the same—advisory. It would advise the town and its officials with respect to proposed by-laws and amendments in terms of the effect of such proposals on the long range plans of the town. Freed from the responsibility of daily administrative detail, the board could devote its time to study and to planning. The developer would know with reasonable certainty whether his ambitions were compatible with the town's plan, and the conveyancer would have dependable sources for knowledge of requirements, and public records on which to base the advice he would give his client.

Legislation will not bring Utopia, but the legislation which controls the machinery of local government is a major factor in determining whether our historic freedoms are preserved. By it we can strengthen those vital principles which distinguish self-determination from socialization, and make possible community planning instead of bureaucratic plodding.

PROFESSIONAL AND JUDICIAL ETHICS

The Current Study of the Need of Revising the "Codes" by a Special Committee of the American Bar Foundation and a Request for Suggestions.

INTRODUCTORY STATEMENT

This current study has a direct practical bearing on the professional life of every lawyer and judge in Massachusetts as it is nation wide. Because of its importance we print in full the statement and request for assistance which has been sent to the bar associations in all the states by Hon. Philbrick McCoy of Los Angeles, the Chairman of the Committee.

The Practical Relation of Canons to Authorized and Unauthorized Practice

Some men object to, and even ridicule, the idea of reducing standards of professional conduct to the form of codified rules, and as Judge Carter points out, "it is always found difficult to state abstract ethical propositions in practical form" to satisfy lawyers. The convenient word "code" unfortunately tends to create some prejudice against the real value of the group of canons which have been framed to assist members of the profession in dealing with serious, and sometimes difficult, problems, in connection with which the history of the best practice and the reasons for it are not always conveniently available. There is nothing new in the ideas expressed in the canons.

In what follows we are not "preaching." We are simply stating professional facts which are easy to overlook.

All over the country the bar has been orating, protesting, and even at times whining about the "unauthorized practice of law." But unless the bar maintains the professional spirit and standards which alone justify their respected privilege to practice, they will gradually find themselves losing public respect more and more. This actually happened after the civil war during the Tweed regime in New York. It led to the organization of the Bar Association of the City of New York to drive corrupt judges from the bench and preserve and revise standards of decency. Such standards are not "highbrow stuff." They are the essence of the "authorized" profession which alone justify protests against "unauthorized practice."

The Story in Massachusetts

As many of the present generation of lawyers and judges may not be familiar with the history of the codes we outline the story for their convenience. The required lawyer's oath on admission to

the bar which dates from 1686 is a short code of professional behavior. The story in more detail will be found in Benton's "The Lawyer's Oath and Office." At the beginning of the present century there was a growing conviction that more was needed to help the bar and especially its younger members to realize the meaning of and reasons for professional traditions and standards.

In the first number of Vol. 1 of the Massachusetts Law Quarterly, November, 1915, appears the following statement:

"The American Bar Association at its thirty-first annual meeting held at Seattle, Wash., on August 27, 1908, adopted thirty eight canons of professional ethics. The Massachusetts Bar Association at its annual meeting held at Boston on October 30, 1915, adopted the thirty-three canons of professional ethics which follow. The adoption of these canons was recommended by the Executive Committee after the report of a Special Committee, the subject having been under the consideration of the committees for several years. A copy of these canons was mailed to every member of the Association in advance of the meeting of October 30, 1915, in connection with the notice of the meeting, stating that the matter would be acted upon, and the canons were adopted at the meeting of the Association without a dissenting vote.

"They are substantially in accord with the canons of the American Bar Association. They are the same in substance as the code of the Bar Association of the City of Boston, and it is expected that that Association will amend its code in January, 1916, to make it identical in both form and substance."

Thereafter those thirty-three canons (which had also been formally adopted by the Boston Bar Association) were printed in pamphlet form and distributed to those seeking admission to the bar. These A.B.A. canons with later amendments and additions are still thus distributed.

In 1915 Hon. Orrin N. Carter of the Supreme Court of Illinois published a little book entitled "The Ethics of the Legal Profession" which contained an account of the history of professional "codes" beginning with that in Alabama in 1887. In his introduction to Judge Carter's book, Dean Wigmore said:

"For lawyers, the most important truth about the law is that it is a profession. That important truth has been more and more forgotten among us of late years. To restore it to our convictions will be a great service . . .

"And if it is thus set apart as a profession, it must have traditions and tenets of its own, which are to be mastered and lived up to. This living spirit of the profession, which limits, yet uplifts it as a livelihood, has been customarily known by the vague term legal ethics. There is much more to it than rules of ethics. There is a whole atmosphere of life's behavior."

As former Chief Justice Edward G. Ryan of Wisconsin expressed it many years ago "the general law of the profession is duty,

not success. In it, as elsewhere in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the bench and of the bar."

If any of the standards seem high standards they have to be high or they would not be standards and it should be remembered, as with the gradual rise in standards for admission to the bar, that it is becoming harder and harder, in a rapidly changing world, to be a good lawyer or a good judge, because of the expansion of law and of the variety of facts.

Judicial Ethics

The canons of judicial ethics were adopted by the American Bar Association in 1924. They were drafted by a distinguished committee consisting of Chief Justice Taft, Chairman, Chief Justice Cornish of Maine, Chief Justice von Voschzicker of Pennsylvania, Charles A. Boston of New York and Garrett W. McEnerney of California. They were widely distributed for comment before they were adopted. They were printed in the "Quarterly" in February 1923 (Vol. 8, No. 3) and August 1923 (Vol. 8, No. 5).

In the "Quarterly" for May 1925 (Vol. X, No. 3) we printed an address on "The Growth of Judicial Ethics" delivered before the Maryland bar by Hon. Carroll T. Bond, then Chief Judge of the Maryland court of appeals. It is an interesting story.

The purpose of the canons of judicial ethics is suggested by the following passage in the "Memoir of Hon. Theophilus Parsons," Chief Justice of the Supreme Judicial Court of Massachusetts from 1806-1813, by his son, Prof. Theophilus Parsons:

"I believe there was nothing which my father more desired than that people should cultivate in themselves a kind and respectful, but watchful jealousy of the judicial department, and should feel a deep and sincere, and yet a rational respect for it, founded upon a just understanding of the vast importance of its functions. And that the people might so feel, the very first and most essential cause must be, that the judicial department should *deserve* to be so regarded. He wished that the people should see and know, clearly and certainly, the utility of the judiciary *to them*, and that they should see and know as clearly the means by which their utility might be secured and preserved.

"In this department he included, not the judges only, but all who were officers of the courts; and among them he placed all who practised at the bar. And I believe that he was earnest and constant in his endeavors to impress upon his students, and upon others who came within his reach, that it was the duty of every lawyer to feel that upon himself rested some portion of the responsibility, and of the power for good or for evil, with which the institutions of a constitutional republic invest its judicial department."

Having said all of this we add a word of warning to the drafters

of canons of ethics. There are more than 200,000 lawyers in America and about 85,000 members of the American Bar Association. We served on the committee of 1927 to "supplement" (not to revise) the canons. The committee met in New York, in Washington and in Atlanta, and were asked orally or in writing to recommend at least sixty new canons. At one of the meetings after listening for several hours the late Walter Taylor, a member of the committee from New York, burst out substantially as follows:

"The standards of behavior of the bar should be those of the Army and Navy—those of an officer and a gentleman, but I suppose some helpful suggestive rules are needed." (See report and minority report in A.B.A. Journal for May 1927 and A.B.A. Reports, Vol. 52, for 1927, pp. 372 and 387-395.)

There is danger of putting too many detailed rules on paper as "ethics." A reasonable amount of character professional imagination and common sense about behavior which cannot be put on paper effectively must be expected under the traditional lawyer's oath which, if studied *and remembered,* contains a great deal. Think the subject over as a practical and not a theoretical question, and suggestions will be forwarded to the special committee of the Foundation.

We hope the importance of the subject will be found to justify the foregoing discussion.

STATEMENT OF THE SPECIAL COMMITTEE ON REAPPRAISAL OF THE CANONS OF PROFESSIONAL AND JUDICIAL ETHICS OF THE AMERICAN BAR FOUNDATION

At its meeting in May, 1956, the Board of Directors of the American Bar Foundation took affirmative action on the Report of the Special Committee of the Foundation on a plan for a long-range study of the Canons of Professional and Judicial Ethics. On receiving the Report of the Committee which has been in preparation for a year the Board directed the Committee to proceed with the study within the bounds of a substantial appropriation for its budget for the next fiscal year. In doing so, the Directors affirmatively acknowledged the responsibility of the Bar to restate its codes of ethics in a manner which will reflect the professional responsibilities of both lawyers and judges under the conditions of modern law practice.

The study now under way was undertaken at the request of the American Bar Association and is of substantial significance to all lawyers and judges and to the public. The inadequacy of the existing canons was pointed out several years ago by James Willard Hurst: "A profession may be defined by reference to functions his-

torically performed, or by reference to some theoretical justification for its status and privileges. In any case the concept of a profession has included the recognition of obligations owed to the society, above and beyond the personal advancement of its practitioners. At the lowest ebb in standards of education and admission, lawyers in the United States never wholly lost the tradition—expressed in 1854 by Sharswood's Essay on Professional Ethics—that the practice of law involved at least formal concession to standards of conduct which specially bound the bar. Yet the Stated ethical principles of the profession lacked breadth and penetration; particularly were they inadequate before the challenge of the urban, industrial United States that grew after 1870." (*The Growth of American Law; The Law Makers*, 1950, p. 329.) In support of his criticism Hurst quoted these words by Mr. Justice Stone written in 1934: ". . . . we cannot expect the Bar to function as it did in other days and under other conditions. Before it can function at all as the guardian of public interests committed to its care, there must be appraisal and comprehension of the new conditions and the changed relationships of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole." ("The Public Influence of the Bar," 48 Harv. Law Rev. 1.)

The Canons in Retrospect and Prospect.

The initial task assigned to the Committee was the preparation of the plan for study which has now been submitted to the Directors of the Foundation. When the Committee was created for that purpose early in 1955 it was stated that "the project is that of examining into the actual operation of the canons of legal ethics, including canons applicable to the conduct of judges, with a view to revising or rewriting all or some of them." The Committee was also advised that "the plan of operation, within reasonable limits, should require a careful study of the actual operation of the existing canons plus a study of the areas of professional and judicial life that the existing canons do not cover," and the drafting of new canons when found to be necessary. In short, the committee was advised that in attaining the long-range objective, the Bar should meet the objections of such critics as Hurst and Stone and that the study should be planned accordingly.

As presently stated, to quote from the Report, the Canons of Professional Ethics "contain a mixture of statements of fundamental principles, illustrations of the application of rules to specific types of conduct, statements of the etiquette of the profession, and rules given operative force by courts in disciplinary proceedings." The Canons as adopted in 1908 were based primarily on Sharswood's *Essay on Professional Ethics*, first published in 1854 and republished as volume 32 of the American Bar Association Reports in 1907, and on the first formal code of ethics in this country, called

"Rules for Governing the Conduct of Attorneys," approved by the Alabama Bar Association in 1887 (118 Ala. xxii). According to the Report, "no field work was undertaken, apparently, nor was any other systematic attempt made to ascertain the spontaneous views of lawyers concerning ethical problems of practice." As Hurst said in 1950: "Sharswood's little book, the Canons of Professional Ethics adopted by the American Bar Association in 1908, and the principal additions to the Canons in 1928, authoritatively spoke the articulate conscience of the profession in the nineteenth and early twentieth centuries. In emphasis, in relative detail, in the proportionate attention given to various topics, they expressed a conscience which at its best was directed to the honorable relations between individuals, and which took little concern for the lawyer's role in the community. They paid relatively brief, and very general respects to the lawyer's obligation to maintain 'the law'." All subsequent committees of the Association which have dealt with the Canons have been limited to making suggestions for amendments and additions without attempting to re-examine the Canons as a whole.

Certainly Sharswood could not foresee the growth of new fields of practice and developments in established fields which have greatly affected the work of lawyers and judges in the century which followed the first publication of his *Essay;* nor is it likely that many of those who as members of the American Bar Association drafted and adopted the original Canons of Professional Ethics in 1908 anticipated the changes in the work of both judges and lawyers brought about by the great changes in our society and economy during the last fifty years. Perhaps the same observation may fairly be made with regard to the distinguished committee which drafted the first Canons of Judicial Ethics adopted in 1924.

With reference to the changes during the past fifty years in the work of judges and lawyers, the Committee made several specific findings. In its report to the Directors it said:

> "During this period there has taken place the development of a predominantly urban, complex industrial economy with closely related, mutually dependent business units and labor unions. Changes brought about by these developments, scientific advances, two world wars and the coincident increase in the taxing and regulative activity of local, state and federal governments strongly affect the work lawyers do for individual and corporate clients, labor unions and trade associations.
>
> "Several of the important branches of modern law practice, such as taxation, transportation law, regulation of business, security transactions, workmen's compensation, administrative law and labor law, have appeared on the scene since 1908, and come to their full growth after 1928—the times at which most of the Canons were adopted.
>
> "Generally speaking, the growth in complexity of our economy has had the tendency to develop in addition to the trial lawyer,

the office lawyer who works as a member of a highly organized firm or in the legal department of a corporation or government agency.

"The shift in activity of a large segment of the Bar from advocacy to counseling and business planning is one of the trends which has been widely commented upon. A companion trend, also widely noted, is the development of specialization in the profession. As in other occupations and professions there seems to be a pronounced shift from general practice to practice in one branch of the law in which the lawyer endeavors to develop special competence.

"There also have been significant developments in the traditional function of advocacy. The procedure and practice in the trial of cases has changed with the development of pre-trial hearings and other pre-trial discovery techniques, and with changes in the techniques of trial advocacy such as the development of 'demonstrative evidence' in personal injury trials.

"Many new types of tribunals have been created which depend largely upon the work of the lawyer as advocate. The growth and development of administrative agencies has occurred during this period, giving rise to a continuing debate over the proper role of the lawyer in the administrative process. Similarly, arbitration hearings and collective bargaining negotiations present lawyers with new tribunals to which they have adapted themselves. And with the voluminous increase of statutory law and government regulation, advocacy before legislative bodies has become a more important phase of lawyers' work.

"The economic position of the lawyer has probably dropped substantially during the last fifty years; certainly it has during the last twenty-seven. Surveys made in 1929 and 1951 disclose that there has been a relative decrease in lawyers' income compared with that of other occupations and professions.

"This period has also seen the emergence of businesses, individuals and professional groups which offer services competitive to lawyers; some properly and some improperly. Many of these competitors make use of the commercial techniques of advertising and marketing.

"During the period, significant changes have been made in the organization, education and self-discipline of the profession. This trend has been illustrated recently with the development of integrated state bars and the formation of national associations of lawyers in specialized fields. There have been wide changes in requirements for admission to the bar and in legal education. The enforcement of professional standards has become a matter of particular interest to the bar and one in which great activity has been shown in some states and localities. The American Bar Association itself has grown greatly in numbers and in relative importance to the profession as a whole. Its Canons of Professional Ethics have been adopted, sometimes with some modifica-

tions, by almost all the states, and national legal associations in specialized fields have drawn heavily upon them in framing their own Canons.

"The increase in disciplinary activity has given a great deal more importance to the professional codes and has put them to the test of use by bar association committees and the courts."

One of the major factors which motivated the initiation of this project was the belief that the changes in the practice of law which have materially affected the work of lawyers and judges have brought with them ethical problems for judges and lawyers which may not be covered effectively by the present Canons. On this subject the Committee reported:

"Canons designed primarily for courtroom conduct of lawyers with an independent, general practice in a less complex, less industrialized, less regulated society should be objectively appraised as to their sufficiency for the various activities of lawyers under modern conditions of practice. Similarly changes in the work of judges, and the development of specialized courts and quasi-judicial tribunals such as administrative agencies and arbitration bodies may have made present Canons of Judicial Ethics inadequate or inappropriate.

"The original thirty-two Canons of Professional Ethics were designed primarily for courtroom conduct, as was appropriate at the time they were drafted. They were formulated primarily for the lawyer who was in general practice. Some of the subsequent Canons and amendments dealt in a piecemeal fashion with problems which developed with changes in law practice. However, the emphasis in most of them remains upon the individual courtroom advocate. For example, the present Canons have little to say about the position of the lawyer employed by his 'client,' such as a house counsel for a large organization. The Canon on partnerships deals primarily with the name of the partnerships. No Canon speaks directly about the problems of the office lawyer in advising his client and in drafting legal papers for him. The Canons do not deal with many of the problems created by the development of specialization nor, except in very general terms, with the problems of a lawyer who practices before administrative agencies or legislative bodies.

"Neither do the Canons of Judicial Ethics speak on the problems of the administrative adjudicator or the arbitrator, nor on the responsibilities of a judge in any of the rapidly multiplying specialized courts of limited jurisdiction such as family courts, small claims courts, and traffic courts.

"Apart from the existence of new or substantially altered problems brought about by a change in the condition of law practice, there are certain traditional problems of the profession which, although covered explicitly and sometimes in detail by the present Canons, may have assumed characteristics which make it necessary to reappraise the existing professional standard in re-

gard to them. For example, in the public field, the representation of unpopular persons or causes presents many problems; in the private field, the question of fees should be re-examined in the light of developments in the use of contingent, minimum and statutory fees.

"Changes in legal education, the increase in the numbers in the profession, and the lack of personal contacts which is characteristic of the urban community have made young lawyers depend heavily upon the expressed standards for a guide in their practice. That was not necessary formerly, when students prepared for admission by apprenticeship in a lawyer's office under conditions which made it easier to acquire an understanding of the standards of the profession."

Scope and Methods.

The Committee has prepared a plan for a broad study to determine the sufficiency of the present Canons and to provide information for the formulation of changed and additional standards which the study may show to be desirable. "The goal of the study," says the Report, "would be a statement of the standards for lawyers and judges in their work under present conditions of practice. This statement should be in such a form as to be capable of performing the varied tasks which will be required of it in the education, guidance and discipline of the profession." The scope of the study makes it advisable to concentrate at the outset on the problems of lawyers. As that phase of the study progresses the plan for the study of the standards of judicial conduct will be completed.

The study of lawyers' professional activities will be carried on within an overall analytic framework based upon the lawyers' professional responsibilities to the courts, to clients, to the profession and to the public. In the analysis of the material gathered, three broad categories will be used. (1) ethical standards based upon general principles; (2) the application of such standards in the work of the legal profession; and (3) the application of such standards in disciplinary proceedings.

It is believed that the methods of research to be employed have been adequately designed to provide well considered conclusions as to the adequacy or inadequacy of the present Canons and the need for revision or restatement. For more than a year F. B. MacKinnon, the Research Specialist assigned to the Committee, in cooperation with John C. Leary, the Librarian of the Cromwell Library at the American Bar Center, has been accumulating published material dealing with the Canons of Ethics in particular and with professional and judicial conduct in General. Collection of this material from all sources will be continued. As it becomes available it will be studied and classified as an aid to the organization of the proposed field work. According to the Report: "The distinctive and essential element of the project is a field study to determine the presently recognized professional standards of the profession, the

nature of the ethical problems involved in the administration of justice and suggested solutions for such problems." The need for such a field study should be obvious; as the Committee says, it is "well aware that it cannot draw conclusions and make recommendations *in vacuo*, and that it must draw upon sources of materials on the widest possible basis. To obtain valid results, personal contacts and discussions with those concerned will be necessary. In this way the inaccuracy and superficial data which sometimes results from inquiries solely by questionnaires and correspondence can be avoided."

It is imperative that the study encompass all factors affecting the practice of law. Accordingly, the Committee will inquire into such specific aspects of law practice as the varied functions of the lawyer generally and in relation to all specialized fields of practice, the methods of organization and performance of legal work including such varied matters as the functions of house counsel for corporations and counsel for labor unions, and the scope of the individual lawyer's practice. The Committee will also take into consideration such things external to the practice of law as the economic status of the lawyer and the community in which he practices.

It is obvious that the work which has been undertaken must start in a comparatively small area, defined effectively to test at the outset the proposed methods of research. In defining its program for the coming year the Committee considered the probability that a fairly comprehensive picture of the problems in some areas can be obtained by analysis of published material, correspondence and questionnaires, supplemented by relatively little inquiry in the field. On the other hand, it also considered the likelihood that there may be relatively little published material concerning the practice in certain other areas and consequently that extensive inquiry will have to be made of individuals and groups whose work is immediately concerned with the particular topics there involved. Finally, the Committee recognized that there can be no solution to some problems without the use of both techniques in order to get a complete picture.

With these thoughts in mind five topics have been selected for immediate study. First, in relation to the Professional Responsibility of the Lawyer to his Client, the Committee will inquire into a number of things under the general heading *Fairness to Client*. These include (1) Financial relations with the client: Setting fees, minimum fee schedule, statutory fees, contingent fees, advancing expenses to client, collecting fees; (2) Custody of clients' funds; (3) Business dealings with client; and (4) Commissions and rebates. Particular attention is to be directed to the problems relating to contingent fees and the custody of clients' funds.

For a number of years the Bar has become quite aware of the specialist. The Committee believes that the lawyer may have certain professional responsibilities as the result of confining his practice to a particular branch of the profession. Primarily because of

the expressed desire of the patent bar to co-operate with the Committee in its work, these matters will be studied initially in the field of patent, trade-mark and copyright practice.

Changes in the practice of law during the past fifty years have brought about changes in methods of organization for the performance of legal work. Preliminary studies have indicated a need for a study of the professional responsibilities of the lawyer in the legal department of a corporation, usually referred to as "house counsel." Accordingly a study of this topic has been included in the immediate work of the Committee.

Both lawyers and judges on the civil as well as on the criminal side of the court have great responsibilities with respect to the matter of publicity concerning pending cases. Surely no lawyer or judge can be unaware of the problems in this area and the attempts in recent years to cope with the situation. Canon 20 of the Canons of Professional Conduct was adopted in 1908 and has not been amended. Canon 35 of the Canons of Judicial Ethics was adopted in 1937 and amended in 1952. Recent developments make it a matter of primary importance to all concerned to determine whether, to borrow Hurst's phrase, these Canons authoritatively speak the articulate conscience of the profession, lawyers and judges alike, at the beginning of the second half of the century. Fully aware that such a determination cannot be made in a day, or perhaps in a year, the Committee has decided to initiated its study of this matter at this time.

Certain factors external to the practice of law necessarily affect the practice of every lawyer. These include such things as his economic status, the size and economics of the community in which he practices, the geographical location of that community and its local customs. Throughout its study the Committee intends to consider the effect they may have on the standards of professional conduct. On this score the initial inquiry will be confined to the Chicago metropolitan area where enough information should be available to illustrate the problems which may be involved.

The Responsibility of the Bar.

Such is the immediate program of the Committee and a suggestion of the nature and purpose of its long range undertaking. A word should be said in conclusion as to the part which must be taken by the Bar if that undertaking is to succeed.

During the coming months each state and local bar association and all other groups represented in the House of Delegates will be asked to designate the person or committee within such association or group to whom the Committee is to look for co-operation.

The Committee is fully cognizant of the fact that many problems with which it will be concerned have already been considered and debated across the land and that substantial material has been gathered by the protagonists on either side. To gain the advantage of such studies the Committee intends to appoint advisory commit-

tees composed of lawyers or judges to collect such material and analyse it for the benefit of the Committee. Two members of each advisory committee will be selected to represent different points of view concerning their areas of special competence. The third member will be an impartial lawyer so far as concerns the particular topic assigned to his committee. As chairman, his function will be to make sure that the other two members of his committee present a full coverage of the important practices and problems and the points of view of both sides in relation to such topic. However, it will not be the function of these advisory committees to advise on a solution of these problems, nor to debate the merits of any proposed solutions; their primary function will be to aid the Committee in securing the facts.

As often as possible the work of the Committee will be discussed at meetings of the Bar. The first of these discussions will be in Dallas in August, 1956, as a part of the program of the National Conference of Bar Association Presidents. Another will take place at the Regional Meeting to be held in Baltimore in October, 1956. At the outset the purpose of these discussions in which one or more members of the Committee will participate will be to explain the work of the Committee, expose the problems which must be solved, and seek the assistance which the Committee must have from the organized Bar throughout the country. As the study progresses and possible revisions of the existing Canons or proposals for new Canons take form the Committee will bring its suggestions before the Bar at similar meetings for discussion. This will be done as often as seems advisable in order to be sure as possible that the final product of the study adequately reflects the thinking of the lawyers and judges of today.

When the work of the Committee has been completed it must have the stamp of approval of the American Bar Association. It must always be kept in mind that the Committee has been charged with reviewing the Canons of Professional and Judicial Ethics heretofore adopted by the Association with a view to their possible revision or restatement. In the final analysis the real value to our profession and to the public of any such revision or restatement will depend on the unstinted co-operation of the Bar until our task is completed.

PHILBRICK McCOY,
Chairman, Special Committee on Canons of Ethics.

Los Angeles, California
July, 1956.

CIRCULAR LETTER OF THE ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:

(These circulars have generally been reprinted as an appendix to the reports of the Judicial Council. We think the bar will prefer to have them separately printed in the "Quarterly." Ed.)

February 1, 1956

The annual statistical sheet presenting the work load of the various courts was presented with our circular letter dated November 1, 1955. The period covered was from June 30, 1954 to June 30, 1955. A five year comparison of these figures is set forth as follows:

	1950 to 1951	1951 to 1952	1952 to 1953	1953 to 1954	1954 to 1955
Civil Writs Entered	51,499	51,496	54,871	57,109	62,798
Tried					8,732
Contract	27,881	28,124	31,104	31,016	32,132
Tried					2,355
Motor Vehicle Tort	12,901	12,985	14,358	14,612	20,104
Tried					2,259
Other Tort	2,016	2,392	2,137	2,226	2,095
Tried					305
Summary Process (Ejectment)	7,892	7,282	6,572	8,476	8,072
Tried					3,578
All Other Cases	809	713	700	779	1,395
Tried					235
Removals to S. C.	3,834	4,238	4,321	3,998	9,248
Removal of Motor Vehicle Torts to S. C.	2,582	2,667	2,641	2,599	7,756
Rep. to Appellate Div.	84	74	66	86	92
Appealed to Sup. Jud. Court..	12	17	11	6	11
Supplementary Process	17,664	17,621	18,738	20,013	20,927
Small Claims	54,229	53,572	58,051	73,182	70,877
Criminal Cases Begun	161,897	177,161	194,324	202,334	202,126
Criminal Appeals	3,453	3,251	3,602	3,713	4,057
Drunkenness	52,870	52,557	54,859	53,100	52,917
Automobile Cases (Total)	69,655	85,293	96,367	103,825	103,374
Op. under Inf. Int. Liquor	5,175	5,542	5,518	5,566	5,767
Int. Liquor Cases	206	189	287	315	257
Juv. Cases under 17 years	5,166	5,544	6,200	6,676	6,934
Drunkenness Releases	26,391	26,702	27,609	26,885	26,066
Net Number Brought Before Court	26,569	26,055	27,241	26,215	26,901
Neglected Children	526	555	615	593	547
Inquests	55	53	45	39	38
Parking Tickets Returned	419,582	513,743	502,733	582,131	641,021
No. of Insane Commitments	5,686	5,615	5,763	5,761	5,763

You will note the new entry "Tried" dealing with all "civil writs entered." They have been divided so that figures are given of the number of trials in each classification. They show that 8,732 cases actually went to trial of the 63,789 entered which amounts percentage wise to 13.68% and it will be noted that these figures do not include trials in the "supplementary process" or "small claims" cases, the entries of which total 91,804.

These figures show a substantial increase in the number of civil entries. Contract cases now total over a thousand more than a year ago. The major portion of the increase results from the enactment of Acts 1954, Chapter 616, General Laws (Ter. Ed.) Chapter 218, Section 19 as amended which gives District Courts exclusive original jurisdiction in motor vehicle tort cases so-called. Section 2 of the Act appears in the circular letter of August 12, 1954 with pertinent comment. There were approximately 5,500 more of these cases than a year ago totaling 20,104. The entry of other tort cases remained relatively in accordance with the past five year average. The summary process cases diminished about 400 from the level of last year to 8,072. The number of cases reported to the Appellate Division increased 6 to 92 and to the Supreme Judicial Court from 6 to 11. The supplementary process cases maintained its upward growth by over 900 more entries to 20,927, but the small claims procedure was used less than the year before dropping over 2,000 to 70,877. The criminal entries showed little change from the year before diminishing about 200 to 202,126, though there was an increase in appeals of a little over 300 to 4,057. The number of drunkenness cases has decreased as was the case the prior year to 52,917, but because of over 800 fewer releases nearly 700 more defendants appeared before the court. There was an increase of 201 in driving under the influence of intoxicating liquor cases amounting to 5,767, which is the highest number recorded as appearing in the courts for this serious offense, since our records have been kept. Total automobile cases leveled off from the figure of last year about 500 to 103,374. The figures show a decrease in illegal intoxicating liquor cases to 257 which is less than the past two years. Juvenile cases have increased again as has been the case each year since 1945, totalling this year 6,934 which is 258 more than a year ago. The number of neglected children declined somewhat to 547 from 593. Inquests were held in one less case than last year. The number of insane commitments showed scant variance. The last three years these cases have been 5,763—5,761—5,763 in that order. The number of parking tickets again shows substantial increase to a total of 641,021. Last year this figure was 582,131 and the year before 502,733.

It is manifest from these figures that over 1,000,000 people had direct contact with the District Courts during the year. 641,021 parking tickets, 202,126 criminal cases, 63,798 civil writs entered, 20,927 supplementary process, 70,877 small claims, 6,934 juvenile cases, total 1,005,683. Though there are many "repeaters" and many

are accused of more than one offense, this latter figure does not include the 155,602 defendants in civil cases, nor witnesses in any case, nor any of the law enforcement officers, nor the representatives of the diverse social service organization that attend these sessions.

SOME RECENT DECISIONS OF THE SUPREME JUDICIAL COURT

The attention of the Judges and Clerks is called to the following decisions which have been handed down by the Supreme Judicial Court since our last circular letter.

Commonwealth v. Antonio, 1955 A. S. 951. Defendant was found guilty by a jury on a complaint charging him with practicing medicine without being lawfully authorized so to do. He did not dispute the fact that on several occasions he treated persons for pay in accordance with chiropractic methods. The Court followed the decision in the case of Commonwealth v. Zimmerman, 221 Mass. 184, and held that the defendant was properly convicted.

Commonwealth v. Kelley, 1955 A. S. 969. Defendant was convicted on a charge of receiving stolen goods. The Court says "Possession of recently stolen property puts the burden of explanation upon one charged with having stolen it, and the same principle applies to one charged with having received stolen property, knowing it to have been stolen."

Commonwealth v. Jacobs, 1955 A. S. 983. This case deals with freedom of speech in a public place, by-laws and ordinances of municipal corporations and constitutional law.

LeBlanc et al. v. Welch, 1955 A. S. 987. Action of tort to recover for personal injuries received by a minor who was struck by an automobile on a public way. Defence was that the plaintiff, when injured, was violating a town by-law prohibiting coasting on the street. The Court says "It is well settled that, if the plaintiff was coasting on a way not set apart for that purpose, her violation of the town by-law would bar recovery for injuries caused by negligence of the defendants. The plaintiff contends, however, that when hit she had abandoned coasting and was standing in the street. We are of opinion that her illegal act in coasting on Hayes Street 'was so intimately connected with her injury as a proximate cause that as matter of law she is barred from recovery based upon negligence'."

Piekos v. Bachard, 1955 A. S. 991. An interesting case. It deals with the sale of nursery stock and Christmas trees.

Howard Brothers Manufacturing Company v. Director of the Division of the Employment Security et als., 1955 A. S. 1031. This decision says that the general purpose of the employment security law is to afford benefits to persons who are out of work and unable to secure work through no fault of their own; that it is not the purpose of the law to provide strike benefits for persons who have vol-

untarily left their jobs in violation of contract, and that this remains true even after the strike has technically come to an end through replacement of employees.

Fisher v. Swartz, 1955 A. S. 1055. This case contains an excellent discussion of the admissibility of a writing used by a witness to revive or stimulate a present recollection, or having no recollection, with the aid of the writing to use it merely as a record of his past knowledge. We recommend a careful reading of this case.

Commonwealth v. Macomber, 1955 A. S. 1091. Defendant was found guilty by a jury of promoting and setting up a lottery for money, in violation of G. L., c. 271, sec. 7. The alleged lottery was carried on through the instrumentality of a so-called "pin ball machine," which was licensed under G. L., c. 140, sec. 177A. A state police officer playing the machine won twenty-four free games and, directing the attention of defendant to these games, asked him for $1.00, which the defendant gave him. Defendant admitted that he gave the officer $1.00, but said he did so because he thought he had made a mistake in making change for him earlier. The Court says that it believes that Section 177A, which was enacted after the decision in Commonwealth v. Rivers, 323 Mass. 379, which held that the "free games" functions of a pin ball machine constituted a prize or property of value, was enacted for the purpose of permitting the use and maintenance of automatic amusement devices, such as pin ball machines, including "free play" pin ball machines if duly licensed and if used for amusement only, and that there is no doubt that if the officer received nothing more of value that "free games" there would have been no violation of Chapter 271, Section 7; but in this case the officer who played the game received money for his success and this plainly constitutes a violation of Chapter 271, Section 7.

Mazukna et al. v. Powers, 1955 A. S. 1125. Rear end collision. In this case the Court again affirms the rule stated in Berda v. Foley, 302 Mass. 411, to the effect that "Evidence of a rear end collision without evidence of the circumstances . . . is not proof of the negligence of the operator of either vehicle . . . but slight evidence of the circumstances 'may place the fault'."

Louis Comeau et al. v. Harrington et al., 1955 A. S. 1171. In this case the defendant urged the court to overrule the doctrine first enunciated by it in Dudley v. Northampton Street Railway, 202 Mass. 443, where it was held that one who owns and operates upon a highway an automobile not registered as required by law is a trespasser and other travelers upon the highway owe him no duty excepting to refrain from injuring him by acts done with a wanton or reckless disregard of consequences. The Court says that "As an original proposition, it could hardly find favor with us today. The rule, however, has stood for more than forty-six years without repeal by the Legislature. Some of us would prefer to overrule the Dudley

case, but the majority of the court think that its termination should be at legislative, rather than at judicial, hands."

Commonwealth v. Riley, 1956 A. S. 19. Defendant found guilty of operating negligently in District Court. Before pleading not guilty in Superior Court the defendant filed motion to quash and plea in abatement on ground (1) that the District Court judge refused him the right through counsel to cross-examine witnesses at hearing on issuance of process and (2) that judge who issued process refused to disqualify himself from hearing the case. The Court said there was no error, that the statute does not give the prospective defendant the right to cross-examine witnesses, and upheld the Superior Court judge that the plea of not guilty in the District Court waived the motion and plea and there was nothing in the contention that the judge should be disqualified.

NOTICE IN SNOW AND ICE CASES

Chapter 505, Acts of 1955

In listing the Legislative Acts of 1955 in our circular letter of November 1, 1955 we overlooked Chapter 505 entitled "An Act relative to notice to owners of private property of injuries resulting from snow and ice."

This statute requires a person claiming injuries founded upon the defective condition of one's premises or adjoining ways when caused by or consisting in part of snow or ice to give written notice of the time, place and cause of the injury only when such snow or ice results from rain or snow and weather conditions.

Undoubtedly this statute was passed as a result of the decision of the Supreme Court in Smith v. Hiatt, 329 Mass. 488, where it was held that an action against a husband and wife by a nurse employed in their home for personal injuries sustained through slipping on ice from the refrigerator negligently dropped or left on the kitchen floor by the wife who was present at the time of the accident and knew of it, was barred by the failure of the plaintiff to give written notice of the time, place and cause of the injuries, pursuant to G. L., c. 84, Sec. 21.

POLITICAL ACTIVITY

One of the problems that seems to harass the committee constantly is the participation of Justices, special justices, clerks and other court personnel in politics. Whether such participation is on the local or other governmental level it has been the opinion of the committee through the years that such active interest should not persist. We have just experienced municipal elections in many of our cities and the annual town elections are at hand or have been held. This is also the year of our national election when partisan-

ship may become rather bitter. We feel it is timely, therefore, to call to the attention of all court justices and other personnel the continued opinion of the committee that they should not be active politically, by taking part in any way in any of these contests. In relation thereto we are herewith setting forth the applicable canons of the American Bar Association to which we fully subscribe in order that we may have before us a constant reminder of what we believe our official conduct should be.

28. PARTISAN POLITICS

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

30. CANDIDACY FOR OFFICE

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

SIMULTANEOUS SESSIONS

Simultaneous sessions allotted to each of the Courts shall remain as they were last published and forwarded to you except in such instances as requests have been made for reconsideration. In such cases the court involved will be directly communicated with.

COMMITMENT OF MENTALLY ILL

Chapter 637, Acts 1955

About four pages of our circular letter of November 1, 1955 was given to a discussion of Chapter 637 of the Acts of 1955. In carrying out its provisions certain courts have had an increased amount of work that may necessitate the assignment of more simultaneous sessions to such courts. The hearings necessitated by the terms of the act are being held at each hospital and this procedure seems to work satisfactorily thus far. Worcester, Northampton,

Westboro, Taunton, Dedham, Salem, Concord and Brockton are the courts that have had to deal with administering the act. We urge that a careful record of these cases be kept.

CHANGE IN CHAIRMANSHIP OF COMMITTEE

We cannot close this letter without paying a deserving tribute to Judge Riley, who after many years as Chairman of our committee, has relinquished his duties. His constant attention to the many trying problems with which your committee deals, his tact, frankness and fair dealing have impressed the officials of our courts and the general public. Fortunately he remains on the committee to give us the benefit of his wise counsel and intuitive understanding. Judge Nash has been chosen to head the committee.

Judge Riley's signature appears on the letter but he has not been given the opportunity of reading the last paragraph.

ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

KENNETH L. NASH, Chairman
FRANK L. RILEY
LEO H. LEARY
ERNEST E. HOBSON
ARTHUR L. ENO

GUARDIANS AD LITEM IN SMALL ESTATES

The Editor has received the following letter from a member of the bar in one of the rural counties.

> "I am writing because of a retort made by the Probate Judge in this county yesterday. The situation was this: There was a very small estate—hardly enough to pay either a fair attorney's fee or a guardian-ad-litem's fee. The pertinent statute requires the latter. Said the court, "It's a nuisance in certain cases. I wish that some civic-minded group would attempt to get an amendment leaving such an appointment up to the discretion of the court." We assumed that he meant in cases below a certain total.
>
> "I wish you would consider this."

We consider it as follows.

Why should the beneficiaries of a small estate or trust who need the money be compelled to pay for an unnecessary perfunctory appointment of somebody to assist the Court when the Court needs no assistance? Is there not enough expensive waste motion without that? Cannot a probate judge be trusted to look after the interests of poor people in simple matters? If not, why not? F. W. G.

MEDICO-LEGAL ASPECTS OF BLOOD TESTS

by

JOHN F. LOMBARD *of the Boston Bar*

A Correction

The "Quarterly" for June 1956 (pp. 33-36) carried an interesting article by Mr. Lombard on the subject at the head of this note. By accident in distributing citations in print, those for Indiana, Maine, California, New York and New Jersey on p. 33 were switched so that Indiana had a California citation, Maine an Indiana citation, etc. We regret the accident.

The correct statutory citations are as follows:

California — Deering's Cal. Code, ch.8, s.1980.1—1980.7

Indiana — Burns Ind. St., s.3—658.

Maine — R.S. (1944) ch.153, s.34; Rev. St., ch.166, s.34.

Maryland — Anno. Code, Gen. Laws (Flack Supp. 1943); Art. 12, No. 17.

Massachusetts — Gen. Laws (Ter.Ed.) ch.273, s.12a; Mass. St. 1954, ch.232 effective 3/23/54.

New Hampshire — Rev. Laws 6126 of 1953 effective 4/29/53.

New Jersey — N.J.S.A., 2:99—3, 4.

New York — C.P.A., s.306a—code of Cr. Proc., s.684a, Superior Cr. Courts Act, s.684a; Domestic Relations Law, s.126a; Domestic Relations Act of City of New York, No. 24 (1942).

North Carolina — G.S. (Michie Supp. 1945) s.49-7.

Pennsylvania — Acts 1951, act no. 92; Purdons St. Title 28, s.306.

Ohio — Gen. Code, 12122—1, 2.

Rhode Island — Gen. Laws 424, s.8 as amended; St. 1949, ch.2322.

South Dakota — S.D.C. (1939) 36.0602, Sup. Ct. Rule 540 (1939).

Wisconsin — St. 1949, ss.166.105, 325.23.

F. W. G.

BAR ASSOCIATIONS AND COURT CONGESTION

At the Bar Activities Section of the American Bar Association on Monday, August 27th, in Dallas, Texas, we submitted the following remarks to stimulate discussion. Perhaps they will stimulate a little here.

1. Bar Association representatives and the bench and bar should think outside as well as inside of court houses to get a balanced view of the modern needs of the practical administration of justice in civil cases which create the bottle necks of congestion. The enormous and increasing business of the administration of justice requires, as a matter of common sense, consideration of the business aspects of the problem by all of us.

2. At the regional meeting in Hartford in April Judge Peck of New York reminded us that our courts for years, have been losing in competition with public administrative tribunals and private arbitration, so that more and more commercial and other judicial business has been taken away because the courts and the bar have been and are too slow in their methods for modern conditions.

3. These facts may be obscured but they cannot be permanently concealed by oratory about civil jury trials. It might as well be realized that the constitutional right in civil cases is a right to a jury "trial" and, as stated by the Massachusetts Judicial Council in its 31st report, not a right of a party or of his lawyer to claim an unwanted jury trial for "horse trading" purposes or for delay or perfunctorily as a matter of habit. Reasonable regulations and experiments in practice are therefore legally possible to meet the public nuisance created in the form of court congestion as well as on the highways by dangerous machines and their drivers.

4. Judge Peck in his address on "The Future of the Trial Lawyer" states his belief that judicial business can and should be kept in the courts. He believes that "the trial lawyer faces his crisis." To what extent is he right? Look up what he says and think it over. To use a new word coined, to my astonishment, by my son, what is needed in our profession, as in all others, is "imagineering."

F. W. G.

BOOK REVIEW

Massachusetts State Government, by The League of Women Voters of Massachusetts, Harvard University Press, 1956, XV, 399 pp.

by WILLIAM J. CURRAN*

Probably the least well-known of the three basic levels of government in this country, federal, state, and local, is the state government. This is a fact not much in dispute, yet it exists contemporarily with a widespread attack on the Supreme Court of the United States on a charge of "usurping" state powers to the federal government, and with an effort on the part of some Southern states to adopt a policy of "interposition" in regard to a Constitutional mandate.

Of course, the plea of "let the states handle the problem" is hardly new. It was the battle cry of the anti-federalists in the 1870's; of the anti-New Dealers all through the 1930's. Too often it has seemed that the real meaning of the plea was "Let the states do it—and they will do nothing." Is that its meaning today? What is the function of state government? Is it merely the last resort of the frustrated conservative? Can, and will, the state governments protect civil liberties? Will the state governments provide needed dynamic change in government's role as society's needs change?

To begin to attack these problems of our day we need to know more about what our state governments can do and what they are doing. Here is a book which admirably performs this function for the state government of Massachusetts as well, it seems to this reviewer, as it is possible and practicable to do it in four hundred pages.

The book has no individual author. It is a cooperative effort of that remarkable organization, the League of Women Voters of Massachusetts.[1] It has been produced over a five year period since 1950 with the characteristic thoroughness of research and careful language for which the League's representatives are most noted by anyone who has worked with the legislature on Beacon Hill.

This is not an easy book to review. It covers so much area—and it covers it so well. The book opens in the traditional manner with an historical introduction. This is capably done in twenty-seven pages, ranging from treatment of the settlements and the colonial period, to the immigrant invasions of the latter nineteenth

---

*Associate Professor of Law, Boston College Law School, Lecturer in Law and Legal Medicine, Harvard Medical School. Formerly Assistant Director, Institute of Government, University of North Carolina.

[1]In the preface of the volume the names of thirty-three members of the League of Women Voters of Massachusetts are listed as persons "whose sustained effort and devotion have made this book possible." In the League's official *Bulletin* for May, 1956, the name of Katherine Bolt, Publications Chairman of the League, is identified as the "producer-director-manager of the book presently."

century, and ending with an excellent discussion of contemporary geopolitical and economic conditions in the Bay State.

The core of the book follows with parts on each of the chief branches of the government, the legislative, the executive (which includes all administrative agencies), and the judiciary. The last two parts of the book, Parts V and VI, discuss elections and intergovernmental relations respectively.

The chapter on the General Court is extremely well done. It offers a brief, interesting, and highly accurate summary of the organization, functions, and procedures of the Massachusetts state legislature. There is a good outline of the procedure for passage of a bill into law. The discussion of the unique Massachusetts committee system, the joint committees of House and Senate, is well done with some interesting statistics indicating the unequal workloads from committee to committee. The newly-formed Legislative Council is examined and a note is contained on Recess Commissions. There is an astute criticism of the extended length of the legislative sessions in recent years with a listing of the various suggestions which have been made to expedite matters.

The only real fault one might find with the chapter on the legislature in this book, however, is that it is too brief, being only twenty-seven pages. The League knows the practical workings of the legislature better than it knows any other branch, since its representatives are active in legislative matters very extensively. It could perhaps have given us more material on this most vital area.

The next part of the book, Part III, is on the Executive Branch of the government. It receives the bulk of the treatment in the book, with 230 pages, over one-half of the total pages in the book. Every agency in the state government is listed. All major departments are discussed and their functions and administrative structure are examined. The basic principles of "public administration" in regard to state government are outlined and a comparison is made with the present structure of government in Massachusetts.

This is a prodigious accomplishment. It must be remembered that the League had to work here almost without research materials. Massachusetts has no "Government Manual" similar to the federal government publication, annual or otherwise. The closest thing to it is the annual *Manual of the General Court* which is primarily a source book on legislative and political matters. On the basis of these pages alone this book deserves a place on the bookshelves of anyone who must deal with the Massachusetts state government. This is the best treatment in one book this reviewer has seen on Massachusetts state administrative structure.

The chapter on the Judiciary is well done and brief. The notes on the district courts and the congestion in the Superior Court are, perhaps, already out-of-date, however, with the legislative enactments of 1956. Part V on Elections is excellent. The practical experience of the League is utilized fully in this superb analysis of the political system in Massachusetts.

The last chapters are on Intergovernmental Relations. The peculiarly inept county government in Massachusetts is examined astutely. Most local readers will probably be surprised at the extent of county services rather than at the weaknesses in system since there is little comparison with other states. Municipal government is the most important unit of political structure on the local level in Massachusetts and it is recognized as such in the book. The various forms of local government from traditional town meetings to plans A through D are noted. The difficulties in obtaining a greater degree of home rule from the General Court are discussed quite adequately. The most effective material in the chapter, however, is that on the cooperative programs now operating from the state to the local levels. Here we find an outline of the consultative services offered by the state in the form of information and technical assistance. Fiscal programs for grants-in-aid, subsidies, and loans are also examined. There is some discussion of certain state programs not directly concerned with state-local relations from a "public administration" point of view, such as the state-operated tuberculosis sanatoria, state administrative agency regulatory programs on the local level, and state agency review of local agency adjudicatory determinations.

The last chapter of the book is on federal-state and interstate relations. It is a good summary examination of some of the very complex problems in this area. Again the book's best efforts are shown in the listing of the various agencies working in particular areas of federal-state and interstate matters.

It is surprising how many persons, including educators, believe they know something about government if they have been exposed to some of the broad generalities which abound in this field. Here is a practical treatment of the subject with a view to the realities of the subject—and without evident political bias. The book is subtitled *A Citizen's Handbook* and it serves that function well. It could be used also as an excellent textbook in Civics in Massachusetts high schools as well as in specialized college courses in Political Science and Public Administration.

The only concluding remark this reviewer would have is that the book is so well done and so detailed in regard to the specific structures of the state government that it is bound to be out-of-date within a short time in various areas. It serves today as an excellent *Government Manual* for Massachusetts. Can the League's unique talents be prevailed upon to produce periodic supplements or new editions to keep the volume current and thus serve a greatly needed continuing function for good government in Massachusetts?

TREASURER'S REPORT FOR 1955

January 1, 1955 to January 1, 1956

INCOME

1956 Senior Dues	$45.00	
1956 New Junior Dues	254.00	
1956 New Senior Dues	172.50	
1955 Senior Dues	27,322.50	
1955 Junior Dues	722.00	
1955 New Senior Dues	742.50	
1955 New Junior Dues	184.00	
1955 Affiliated Association Dues	112.50	
1957-8 Dues Senior Prepaid	7.50	
1957-8 Dues Junior Prepaid	16.00	
1954 Senior — Past	427.50	
1954 Junior — Past	4.00	
1954 Affiliated Association — Past	7.50	
Total Dues Received		$30,017.50
Interest Received — Worcester County Institution for Savings	205.00	
Interest Received—Worcester Mechanics Savings Bank	132.50	
Advertising — Mass. Law Quarterly	1,041.00	
Receipts for Sale of Quarterly Issues	28.04	
Law Scholarship Fund — Divs.	294.90	
Nutter Fund — Int.	18.75	
Miscellaneous Receipts — Portrait Fund	1,561.56	
Total Other Income		3,281.75
TOTAL INCOME		$33,299.25

EXPENSES

President's Expenses	235.38	
Secretary's Expenses	500.00	
Treasurer's Expenses	328.63	
Executive Committee's Expenses	1,103.30	
Membership Committee Expenses	704.05	
Grievance Committee Expenses	100.43	
Legal Committee Expenses	50.00	
Massachusetts Law Quarterly Expenses	6,694.10	
Public Relations Committee Expenses	1,309.76	
School Program Expenses	99.02	
American Bar Association Cont. Expenses	219.94	
Heritage Program and Dinner	3,789.91	
Mid-Winter Meeting Expenses	1,580.06	
Annual Institute and Convention Expenses	4,839.40	
Central Office Expenses	5,903.30	
Central Office Salaries	5,520.00	
General Expenses	1,285.42	
TOTAL EXPENSES		34,262.70
1955 NET INCOME		—$963.45

CHECKING ACCOUNT

YEAR 1955

Cash on hand January 1, 1955 — Checking Account		$4,494.11
RECEIVED:—		
From Dues — Membership (See Income and Expense Account)	$30,017.50	
Savings Bank Interest	337.50	
Dividends — Law Scholarship Fund	294.90	
Interest — Nutter Fund	18.75	
Massachusetts Law Quarterly Advertising	1,041.00	
Sale of Law Quarterly	28.04	
Miscellaneous Receipts	1,561.56	
Contributions: — Fuller	60.00	
Contributions: — Law Scholarship Fund	460.00	
Withholding Tax Reserve	167.70	
Bonds — Sold	1,500.00	
		35,486.95
		$39,981.06
PAID OUT (TOTAL EXPENSES)	$34,262.70	
Transfer to Savings Accounts	2,000.00	
Invested in Stocks for Law Scholarship Fund	736.06	
Invested Bonds for Nutter Fund (reinvested)	1,500.00	
		38,498.76
		$1,482.30

BALANCE ON HAND IN CHECKING ACCOUNT
JANUARY 1, 1956

Balance:		
Reserve for Withholding Tax	$167.70	
Reserve for Investment for Law Scholarship Fund	213.24	
Balance for Expense	1,101.36	
	$1,482.30	

LAW SCHOLARSHIP FUND — REPORT
AS OF DECEMBER 31, 1955

	Income	Principal	Balance
Total Principal on Hand January 1, 1955		$5,988.02	
Total Principal Received in 1955		460.00	
Stock Received in 1955		128.34	
			$6,576.36
Income on Hand January 1, 1955	$717.32		
Income Received in 1955	294.90		
			1,012.22
TOTAL IN FUND			$7,588.58
Total Contributions Invested January 1, 1955		5,988.02	
Contributions Invested in 1955		588.34	
			6,576.36
Income Invested January 1, 1955	$522.92		
Income Invested in 1955	276.06		
			798.98
*TOTAL AMOUNT INVESTED JANUARY 1, 1956			$7,375.34
Principal Uninvested			
Income Uninvested	213.24		213.24
TOTAL FUND			$7,588.58

*281 Shares Eaton & Howard
*220 Shares Boston Fund

We the undersigned, appointed by Joseph Schneider, President of the Massachusetts Bar Association, to audit the report of the Treasurer of the Massachusetts Bar Association for the year 1955, report as follows:

"We have examined the books and accounts of the Treasurer and certify that they are correct."
October 10, 1956

CHARLES S. BOLSTER
HAROLD HORVITZ

E. L. Grimes Printing Co., Boston, Mass.